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IN THE

Supreme Court of the United States

October Term, 1977.

No. 77-136

ALDENS, INC.,

Petitioner,

v.

BRONSON C. LaFOLLETTE, Individually and as Attorney General for the State of Wisconsin, and ERICH MILDENBERG, Individually, and as Commissioner of Banking for the State of Wisconsin,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

BERNARD G. SEGAL,
RALPH S. SNYDER,
JAMES D. CRAWFORD,
Attorneys for Petitioner.

SCHNADER, HARRISON, SEGAL & LEWIS,
1719 Packard Building,
Philadelphia, Pennsylvania. 19102

DONALD L. HEANEY,
ISAKSEN, WERNER, LATHROP & HEANEY,
122 West Washington Avenue,
Madison, Wisconsin. 53703

RAYMOND N. FRIEDLANDER,
5000 W. Roosevelt Road,
Chicago, Illinois. 60607
Of Counsel.

International Printing Co., 711 So. 50th St., Phila., Pa. 19143 — Tel. (215) 727-8711

INDEX.

	Page
OPINIONS BELOW	2
JURISDICTION	2
QUESTION PRESENTED	2
CONSTITUTIONAL PROVISIONS AND STATUTE INVOLVED	3
STATEMENT	5
The Facts of the Case	7
The Decision of the District Court	10
The Decision of the Court of Appeals	10
REASONS FOR GRANTING THE WRIT	13
In Upholding the Wisconsin Statute in This Case, the Court Below Sought to Limit or Avoid This Court's Clear Holdings That a State Lacks the Power to Regulate an Interstate Trader Which Has No Presence in the Regulating State, Even Though That State May Have a Substantial Interest in Controlling the Conduct It Seeks to Regulate	13
A. This Court's Controlling Decisions	16
B. The Court of Appeals' Attempt to Distinguish This Court's Decisions	19
C. The Policy Behind This Court's Decisions	23
CONCLUSION	26
APPENDIX:	
Opinion of the District Court	A1
Opinion of the Court of Appeals	A16
Order of the Court of Appeals on Petition for Rehearing	A32
Statutes Involved	A34

TABLE OF CITATIONS.

Cases: Page

Aldens, Inc. v. Packel, 524 F. 2d 38 (3d Cir. 1975), cert. denied, 425 U. S. 943 (1976) 5, 7, 9, 13, 19
Aldens, Inc. v. Ryan, No. CIV-75-0458-O (W. D. Okla., June 14, 1976) (appeal pending) 9
Allenberg Cotton Co. v. Pittman, 419 U. S. 20 (1974) ..5, 6, 10, 12, 16, 18, 20, 21, 22, 23
Baldwin v. G. A. F. Seelig, Inc., 294 U. S. 511 (1935) 17
Complete Auto Transit, Inc. v. Brady, — U. S. —, 45 U. S. L. W. 4359 (March 7, 1977) 20
Dahnke-Walker Milling Co. v. Bondurant, 257 U. S. 282 (1921) 21
Eli Lilly & Co. v. Sav-On-Drugs, Inc., 366 U. S. 276 (1961) 5, 16, 21
Great Atlantic & Pacific Tea Co. v. Cottrell, 424 U. S. 366 (1976) 6, 18
Henneford v. Silas Mason Co., 300 U. S. 577 (1937) 16
Hoopeston Canning Co. v. Cullen, 318 U. S. 313 (1943) 11, 15
Huron Portland Cement Co. v. City of Detroit, 362 U. S. 440 (1960) 10
Memphis Steam Laundry v. Stone, 342 U. S. 389 (1952) 17
Milk Control Board v. Eisenberg Farm Products, 306 U. S. 346 (1939) 17
National Bellas Hess v. Department of Revenue, 386 U. S. 753 (1967) 5, 6, 7, 9, 10, 12, 15, 16, 18, 19, 20, 21, 23
National Geographic Society v. California Board of Equalization, — U. S. —, 45 U. S. L. W. 4343 (April 4, 1977) ...5, 6, 7, 16, 19, 20
Robbins v. Shelby County Taxing District, 120 U. S. 489 (1887) 17
South Carolina State Highway Department v. Barnwell Bros., 303 U. S. 177 (1938) 10
Travelers Health Assn. v. Virginia, 339 U. S. 643 (1950) 11, 14
United States v. Aluminum Co. of America, 148 F. 2d 416 (2d Cir. 1945) 11, 14

TABLE OF CITATIONS (Continued).

Miscellaneous: Page

1 Cons. Cred. Guide (CCH) 1401-50 (1977) 24
Constitution of the United States:
Article I, Section 8, Clause 3 3
Fourteenth Amendment, Section 1 3
16 C. J. S. Constitutional Law § 174, p. 889 22
Federal Truth in Lending Act, 15 U. S. C. §§ 1601-65 9
Municipal Code of Chicago, § 100-29.6 24
N. Y. Gen. Bus. Law (McKinney) § 396-M(d)(i) (1975) 25
U. S. Bureau of the Census, Statistical Abstract of the United States, 1976 5
Wisconsin Consumer Act, Wis. Stats., Title XL, Chaps. 421-427; W. S. A. 421-427, Section 421.201 3
28 U. S. C. § 1254(1) 2
28 U. S. C. § 2201 9

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Respondents.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

—

Aldens, Inc. petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Seventh Circuit entered in this case on March 25, 1977.

OPINIONS BELOW.

The opinion of the United States Court of Appeals for the Seventh Circuit (A16-A31),[1] as amended, is reported at 552 F. 2d 745; the opinion of the United States District Court for the Western District of Wisconsin (A1-A15) has not yet been officially reported.

JURISDICTION.

The judgment of the Court of Appeals was entered on March 25, 1977. Aldens filed a timely petition for rehearing en banc which was denied on April 25, 1977, although the Court ordered, at the same time, a modification of its opinion of March 25 (A32-A33).

The jurisdiction of this Court is invoked pursuant to 28 U. S. C. § 1254(1).

QUESTION PRESENTED.

Is not a state statute regulating the terms and conditions of retail sales contracts unconstitutional under the Commerce and Due Process Clauses as applied to a mail order seller which engages in no local activities and has no property in the regulating state and whose only contact with the residents of that state is by interstate mail or common carrier?

1. References herein to "A" pages are to pages in the appendix to this petition. References in the form "R. —a" and "R. —b" are to pages in the appendix and the supplemental appendix in the Court of Appeals, respectively.

CONSTITUTIONAL PROVISIONS AND STATUTE INVOLVED.

Article I, Section 8, Clause 3 of the Constitution of the United States provides:

> "The Congress shall have Power . . . To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes; . . . ."

The Fourteenth Amendment of the Constitution of the United States provides at Section 1:

> "Section 1. . . . . nor shall any State deprive any person of life, liberty, or property, without due process of law. . . .

Section 421.201 of the Wisconsin Consumer Act, Wis. Stats, Title XL, Chaps. 421-427; W. S. A. 421-427, which purports to make its maximum finance charges binding upon interstate credit transactions such as those conducted by Aldens, provides in pertinent part:

> "(2) For the purpose of this act, a consumer transaction or modification of a consumer transaction is made in this state if:
>
> ° ° °
>
> "(b) The merchant induces the customer who is a resident of this state to enter into the transaction by face-to-face solicitation or by mail or telephone solicitation directed to the particular customer in this state.
>
> ° ° °
>
> "(3) With respect to a transaction pursuant to an open-ended credit plan, this act applies if the

> customer is a resident of this state and the open-ended creditor or a merchant honoring a credit card issued by the open-end creditor, is a resident of the state or furnishes, mails or delivers the goods, services or credit to a resident of this state while the customer is within this state or receives a writing signed by the customer and evidencing the transaction in this state."

Further portions of the statute are reprinted in the Appendix to this petition (A34-A41).

STATEMENT.

This petition seeks to have the Court to make clear that, whatever power a state may have to regulate a business which engages in even the slightest local intrastate activities, both the Due Process and the Commerce Clause deny a state the power to impose its regulations upon a business whose conduct, in the words of the court below, "if not fully equivalent, . . . asymptotically approaches that of the paradigm interstate trader." (552 F. 2d at 750, A24).

Thus, this petition presents a conflict between this Court's decisions in **National Geographic Society v. California Board of Equalization,** – U. S. –, 45 U. S. L. W. 4343 (April 4, 1977), **Allenberg Cotton Co. v. Pittman,** 419 U. S. 20 (1974), **National Bellas Hess v. Department of Revenue,** 386 U. S. 753 (1967), and **Eli Lilly & Co. v. Sav-On-Drugs, Inc.,** 366 U. S. 276 (1961), on the one hand, and the decision below and that in **Aldens, Inc. v. Packel,** 524 F. 2d 38 (3d Cir. 1975), *cert. denied,* 425 U. S. 943 (1976), on the other.

In so doing, this petition pleads the cause of some eight thousand mail order houses,[2] large and small, to be free from the conflicting regulations of up to fifty state and territorial governments and countless local governmental units in whose territories any one of these businesses has no presence—property, employees or activities—and with whose residents its only contact is by interstate mail, telephone and common carrier. For the decision of the court below is as applicable to the regulation of advertising, warranties, repair service and delivery schedules as it is to the regulation of consumer credit sales. And its reach extends to the Ohio nursery, the Oregon, Texas or Florida fruit shipper, the Wisconsin cheese dealer and the Massa-

2. U. S. Bureau of the Census, Statistical Abstract of the United States, 1976.

chusetts or California specialty and gift shops as much as to the Chicago general merchandise dealer.

The two courts of appeal have adopted the view that, wherever there is a "connection in fact" between the regulating state and the interstate trader, the constitutional question can be resolved by way of balancing the state's interest in its regulation against the national interest in the free flow of interstate commerce. Because connection in fact can always be found—if an interstate trader trades with residents of a state at all, its products come to rest there—the lower courts have made all questions of state regulation of interstate commerce solvable by way of an interest balancing approach.

This Court, on the other hand, has recognized that there is a substantial body of cases raising the underlying question of state power to regulate that which is "in fact 'a part of interstate commerce,'" **Allenberg,** *supra,* 419 U. S. at 30. In the view of this Court, before a court may initiate the process of balancing the state interest against burdens on interstate commerce, it must first determine that the interstate trader's activities in the state which seeks to regulate its trade "adequately establish a relationship or 'nexus' between the . . . [interstate trader] and the State that renders constitutional the obligations imposed upon [the trader] . . ." **National Geographic,** *supra,* 45 U. S. L. W. at 4344. This Court has thus drawn a line between that sort of interstate commerce which, by virtue of its local aspects, can constitutionally be subject to state regulation and that purely interstate commerce—that "area of trade free from interference by the States", **Great Atlantic & Pacific Tea Co. v. Cottrell,** 424 U. S. 366, 370 (1976),—which states lack power to regulate.

Indeed that line was defined in terms directly applicable to the present case by this Court in **National Bellas Hess** and reaffirmed in **National Geographic** as separating the class of "mail order sellers with retail outlets, solicitors or property within a State," over whom the state has power, from those "who do no more than communicate with customers in the State by mail or common carrier as a part of a general interstate business," over whom the state lacks power. 386 U. S. at 758, quoted at 45 U. S. L. W. 4345.

While the court below concedes that Aldens is a member of the latter class, it still finds state power to regulate. Thus, what the Court of Appeals has done is to ignore this Court's definition of a constitutionally bounded area of trade free from state interference, and to substitute a boundless balancing approach. Moreover, to the extent that **Aldens v. Packel,** *supra,* supports the view taken by the court below, it and one other court of appeals have erroneously vitiated this Court's statements of constitutional law. It is so that the Court may remedy this error that we urge it to grant the present petition.

The Facts of the Case.

Aldens is an Illinois Corporation which, since its establishment in 1902, has conducted its business solely as a general retail merchandise mail order business operated from a single physical location which is in Chicago, Illinois.[3]

Aldens has no physical presence in the state of Wisconsin. The Court of Appeals summarized as follows:

> "Aldens' only physical presence is in Chicago. It has no Wisconsin office or other place of business and has no representative or tangible property there.

3. This case was decided upon stipulated facts submitted by the parties as a basis for cross motions for summary judgment. The Court of Appeals adopted the "salient facts" as set out by the District Court (552 F. 2d at 747, A18).

> Aldens does not advertise in the Wisconsin media and has no Wisconsin telephone listing although a toll-free Illinois number is provided to its customers. Indeed, Aldens is not required to collect and remit the Wisconsin use tax." (552 F. 2d at 747, A18-A19).

As it does in the other forty-nine states, Aldens conducts its business in Wisconsin solely by means of the United States mails and common carriers. Aldens solicits sales in Wisconsin through catalogs and advertising flyers mailed periodically from Chicago. Orders can be accepted in Chicago only, and all payments must be received there. All merchandise is sent by Aldens from Chicago or other points outside Wisconsin, with the customer paying transportation costs (552 F. 2d at 748, A19-A20).

Sales pursuant to credit accounts, which comprise seventy-three percent of Aldens' sales in Wisconsin, are also centralized in Chicago. Credit applications are received by mail and accepted or rejected there after receipt of completed application forms and credit agreements. Monthly statements are mailed from Chicago, finance charges for late payments are assessed there, and payments of both merchandise and finance charges must be received there. If a customer account becomes delinquent, Aldens attempts collection either through mailed communications or, occasionally, by telephone calls from Chicago to the Wisconsin customer. After six months, delinquent accounts are written off as bad debts, less than half of which are then normally turned over to independent Illinois or Minnesota collection agencies for collection. While Aldens retains a purchase money security interest in merchandise sold on credit, it files no financing statement or security agreement to perfect that interest and

does not otherwise act to enforce its security interest (552 F. 2d at 748, A19-A20).

Aldens' National Credit Agreement, which provides that it is an Illinois contract governed by Illinois law, specifies a monthly finance charge at an annual percentage rate varying from 12% on balances over $350 to 21% for those below that figure. The agreement is valid under Illinois law and the Federal Truth in Lending Act, 15 U. S. C. §§ 1601-65. However, it does not comport with the 18% maximum rate on the first $500 and 12% on the excess specified by Wisconsin's Consumer Act.

In adopting a special credit agreement for Wisconsin credit sales pending the outcome of this litigation, Aldens incurs, in addition to an annual cost for direct loss of revenues on account of Wisconsin's finance charge rates, further losses of $51,000 for preparing special catalogs and advertising materials showing Wisconsin credit terms and $13,700 for special computer processing and handling costs associated with Wisconsin accounts.[4]

On the basis of these facts, petitioner sought declaratory judgment under 28 U. S .C. § 2201 that the finance charge provisions of the Wisconsin Consumer Act could not constitutionally be applied to it.

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4. Nor is Wisconsin the only state seeking to subject Aldens' purely interstate credit sales to the special requirements of its consumer legislation. As we noted above, the Court of Appeals for the Third Circuit has already approved imposition upon Aldens of the provisions of the Pennsylvania Goods and Services Installment Sales Act, which results in substantial losses to Aldens in finance and service charge revenues from its Pennsylvania sales, as well as annual costs of $53,000 to meet the special printing and handling requirements. **Aldens, Inc. v. Packel,** *supra*. Depending on the outcome of this and similar litigation, see **Aldens, Inc. v. Ryan,** No. CIV-75-0458-O (W. D. Okla., June 14, 1976) (appeal pending), there is every reason to believe that Aldens and other purely interstate mail order sellers will become subjected to the enormous costs of the welter of state and local regulations which caused this Court to strike down the statue involved in **National Bellas Hess,** *supra*.

The Decision of the District Court.

The trial court agreed that the Due Process and Commerce Clauses pose substantial barriers to any attempt by Wisconsin to regulate an interstate trader with no local activities within the state. However, the court held that Aldens' "concerted, systematic exploitation of the Wisconsin market" took its transactions out of the realm of pure interstate commerce (A10). Distinguishing **National Bellas Hess** as a case involving taxation, and therefore, one allegedly requiring a far higher level of local activity than would be required to justify application of state statutes seeking to protect the public health and welfare, the court relied instead on **South Carolina State Highway Department v. Barnwell Bros.**, 303 U. S. 177 (1938), and **Huron Portland Cement Co. v. City of Detroit,** 362 U. S. 440 (1960). It reasoned that "while these cases involve physical presence within the state, I have no doubt that a state can act to protect the public welfare from activities affecting the state on the scale of plaintiff's, even though these activities involve no physical presence." (A12-A13).

The court rejected a further argument based on the independent effect of the Commerce Clause, holding that the **Allenberg** decision involved "an unarticulated, but implicit balancing of interests," (A13), and that, in applying the same "balancing test" to the comparable Pennsylvania statute, the Court of Appeals for the Third Circuit (whose reasoning the trial court adopted, A9), had properly found a similar law to be constitutional since it neither discriminated against persons engaged in interstate commerce nor unduly burdened interstate commerce.

The Decision of the Court of Appeals.

While the Court of Appeals conceded that ". . . if not fully equivalent, Aldens' conduct asymptotically approaches that of the paradigm interest trader." (552 F. 2d at 750, A24), it held that as long as such a trader's conduct has a " 'connection in fact' with a state producing an effect within a state," the interstate character of its conduct is only one element of an "interest-balancing analysis." (*Id.*). This analysis it held to have been fully and properly resolved by the Court of Appeals for the Third Circuit, whose opinion it adopted as its own in this respect (552 F. 2d at 749, A22) [5]

The court rejected the contention that either or both the Due Process and the Commerce Clause had the effect of totally depriving a state of power to regulate even a pure interstate trader.

The court allowed that the Due Process Clause must require some minimum nexus between a state and the person against whom it seeks to legislate (552 F. 2d at 750-51, A25-A26), but held that "by now 'objective territoriality,' at least in domestic cases, is beyond argument, *viz.*: 'any state may impose liabilities, even upon persons not within its allegiance, for conduct outside its borders that has consequences within its borders which the state reprehends ° ° °,' " citing **United States v. Aluminum Co. of America,** 148 F. 2d 416, 443 (2d Cir. 1945), **Travelers Health Assn. v. Virginia,** 339 U. S. 643, 648 (1950), and **Hoopeston Canning Co. v. Cullen,** 318 U. S. 313, 316-17 (1943). (552 F. 2d at 751, A26).

As to the effect of the Commerce Clause, the court refused to find that it carved out a protected area within which no state may regulate, but instead "conceptualized" cases barring state regulation of purely interstate traders

5. On the other hand, the Court of Appeals declined to address itself to those arguments presented by Aldens in its petition for certiorari to the United States Court of Appeals for the Third Circuit "since that petition was denied. . . ." (552 F. 2d at 749 n. 7, A22 n. 7).

merely as "declaring that regulations of a certain character are *per se* undue." (552 F. 2d at 752, A28). Having distinguished both **National Bellas Hess** and **Allenberg** as involving such *per se* undue burdens, the court held that treatment of the instant case on a *per se* basis was inappropriate because it involves "an exercise of the police power." (552 F. 2d at 753, A30).

In its original decision, the Court of Appeals had expressed its view of **National Bellas Hess** and **Allenberg** as follows:

> "Contrary to *Bellas Hess* and *Allenberg*, the case now before us is an exercise of the police power. As such it is inappropriate to treat it on a *per se* basis . . . ." (A30).

In response to Aldens' petition for rehearing which noted that **Allenberg** clearly did involve an exercise of the police power, however, the court, by order dated April 25, 1977, struck the words "and *Allenberg*" from the sentence (A33). It did not further modify its original decision and refused Aldens' request for rehearing. (*Id.*).

REASONS FOR GRANTING THE WRIT.

In Upholding the Wisconsin Statute in This Case, the Court Below Sought to Limit or Avoid This Court's Clear Holdings That a State Lacks the Power to Regulate an Interstate Trader Which Has No Presence in the Regulating State, Even Though That State May Have a Substantial Interest in Controlling the Conduct It Seeks to Regulate.

The Court of Appeals begins its discussion of the law with a completely accurate statement of petitioner's position:

> "Aldens maintains, in short, that it is the quintessential interstate trader with no objective manifestation of itself extant within Wisconsin. Therefore Aldens argues that the Due Process Clause of the Fourteenth Amendment and the Commerce Clause positively deny Wisconsin the power to regulate its operations." (552 F. 2d at 748, A21).

Yet, despite the existence of clear precedent from this Court to support petitioner's argument and the lack of any precedent apart from recent litigation involving petitioner,[6] the Court of Appeals, like the trial court before it, upheld the right of Wisconsin to regulate petitioner's purely interstate sales to Wisconsin residents despite the fact that petitioner had no presence in Wisconsin whatever apart from its interstate mailings, telephone calls and deliveries.

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6. As stated by the district court in **Aldens v. Packel**, *supra*, 379 F. Supp. 521, 527 (M. D. Pa. 1974), "there appears to be no reported case upholding state regulation of interstate commerce where the local activities of the business concerned are as scanty as they are here."

Conceding that the cases on which it relied to uphold regulation of Aldens here did involve physical presence within the state, the trial court fell back on its intuitions: "I have no doubt that a state can act to protect the public welfare from activities affecting the state on the scale of plaintiff's even though their activities involve no physical presence." (A12-A13). The Court of Appeals, on the other hand, relied on what it deemed to be the unquestioned rule of "objective territoriality." It found this rule in a statement of federal antitrust jurisdiction over foreign nationals in **United States v. Aluminum Co. of America,** 148 F. 2d 416, 443 (2d Cir. 1945) (not, as the court below implies, a "domestic case": "But by now 'objective territoriality,' at least in domestic cases, is beyond argument. . . ." 552 F. 2d at 751, A26), and in two decisions of this Court, each of which turned on the fact that the case involved a business which did have local activities in the regulating state.[7] (*Id.*). Having this summarily dealt with

7. It is hard to imagine three cases less able to support a conclusion drawn from them than these. Thus, in **Alcoa,** the complaint charged the unlawful monopolization of interstate and *foreign* commerce under section 4 of the Sherman Act, 29 U. S. C. § 4, an area within the sovereign control of the Congress of the United States. Not only did the foreign sellers in **Alcoa,** unlike petitioner, seek to control a portion of the domestic aluminum market, but their activities in international trade, unlike petitioner's activities in interstate commerce, were not protected by the principles of federalism set forth in the Constitution of the United States. In **Travelers Health Association v. Virginia,** 339 U. S. 643 (1950), the only issue before the Court involved the adequacy of service upon the foreign corporation, which the Court of Appeals conceded involved a connection between the state and the person served of a less substantial character than that required when regulation is involved (522 F. 2d at 751, A25-A26). However, Justice Douglas, who, alone among the members of the Court, would have gone beyond the service of process issue to sustain the state's regulatory jurisdiction, would have done so only on the grounds that the insurer had physically entered the state through its use of existing plan members as solicitors for new business. 339 U. S. at 654 (concurring opinion). Justice Douglas explicitly distinguished the case in which—like the

petitioner's Due Process arguments, the Court of Appeals next disposed of the argument that this Court had repeatedly held that the Commerce clause prohibited a state from regulating an out-of-state interstate trader which had no presence in the would-be regulating state by dismissing each of this Court's cases as an example of a limited *per se* rule that a specific regulation or form of conduct was an undue burden on interstate commerce.

Yet the distance between those cases and this one is not to be spanned by a simile. It is the very distinction which this Court declined to obliterate in **National Bellas Hess v. Department of Revenue,** 386 U. S. 753 (1967), between "mail order sellers with retail outlets, solicitors or property within a State, and those who do no more than communicate with customers in the State by mail or common carrier as part of a general interstate business." 386 U. S. at 758. The Court upheld this distinction in **National Bellas Hess,** although the dissenters there argued, exactly as the District Court did here, that Bellas Hess' "large-scale, systematic, continuous solicitation and exploitation of the [state] consumer market," constituted a sufficient basis for state regulation even in the absence of physical presence, 386 U. S. at 761 (dissenting opinion). Moreover, the Court reaffirmed the distinction despite the fact that it had long recognized the states' interest in protecting local competitive markets by enforcing collection of a use tax

7. (Cont'd.)
present case--the foreign corporation has no local presence: "[a] state is helpless when the out-of-state company operates beyond the borders, establishes no office in the state, and has no agents, salesmen or solicitors to obtain business for it within the state." *id.* at 653-54. Again, in **Hoopeston Co. v. Cullen,** 318 U. S. 313 (1943), the Court relied upon the extensive local activities of the Illinois reciprocal insurer in holding that it could be subjected to New York law even though its contracts with New York residents were signed in Illinois. *id.* at 317-19.

on out-of-state merchandise exempt from sales taxes, *see, e.g.*, **Henneford v. Silas Mason Co.**, 300 U. S. 577 (1937).

The point is that the issue concerns not the interest of the state in regulating purely interstate commerce, but rather the power of that state to do so. And what the courts below would treat as a purely formalistic distinction based on physical presence is the only line which protects a purely interstate national business from being subject to regulation by fifty different states plus innumerable local governments. Thus, the Court noted in **National Bellas Hess** that it was the very purpose of the Commerce Clause to prevent the "virtual welter of complicated obligations to local jurisdictions" which would result if purely interstate business were made subject to regulation by the several states. 386 U. S. at 760. Accordingly, it is an essential part of our federal system that there is a domain where "Congress alone has the power of regulation and control." *id.* at 760.

A. This Court's Controlling Decisions.

For purposes of the present petition, the area in which the states are forbidden to legislate is defined by four recent decisions of this Court. In two, **National Bellas Hess,** *supra,* and **National Geographic Society,** *supra,* this Court held that a state may impose the administrative burden of collecting and forwarding its customers' use tax payments upon a mail order house which maintains local offices in the regulating state but not upon a mail order house which has no such local presence. Similarly, in **Eli Lilly & Co. v. Sav-On-Drugs, Inc.,** *supra,* and **Allenberg Cotton Co. v. Pittman,** *supra,* this Court held that a state may require a foreign corporation to register to do business in that state when it engages in local activities in support of intrastate sales of its products but not when its intrastate

activities are solely in support of interstate commerce [8] or, *a fortiori,* when it engages in no local activities whatever.[9]

Since Aldens engages in no local activities within Wisconsin, the balance-of-interest approach taken by the courts below is inappropriate in this case. To the extent that a state seeks to regulate an interstate trader which has neither property nor presence within its borders, there is no enforceable exercise of local power at all; whether or

8. *See, e.g.,* **Memphis Steam Laundry v. Stone,** 342 U. S. 389 (1952); **Robbins v. Shelby County Taxing District,** 120 U. S. 489 (1887) (the "drummer" cases).

9. Also relevant to the instant case are two earlier decisions of this Court in the area of rate and price regulation. These cases further emphasize the requirement for local business activity as a condition precedent to regulation. *Compare* **Milk Control Board v. Eisenberg Farm Products,** 306 U. S. 346 (1939), *with* **Baldwin v. G. A. F. Seelig, Inc.,** 294 U. S. 511 (1935).

In the **Eisenberg** case, the Court upheld the power of the Pennsylvania Milk Control Board to control the minimum prices with respect to the business conducted by the respondent. However, this regulation of Eisenberg's business was permissible despite its incidental effect on interstate commerce because the price controls applied solely to its intrastate transactions—purchases made by Eisenberg from Pennsylvania producers at Eisenberg's Pennsylvania receiving station. The price at which respondent sold the product in interstate commerce to out-of-state buyers was not subject to state control. Thus, the Court noted:

> "The respondent maintains a receiving station in Pennsylvania where it conducts the local business of buying milk. At that station the neighboring farmers deliver their milk. The activity affected by the regulation is essentially local in Pennsylvania. . . . *The Commonwealth does not essay to regulate or to restrain the shipment of the respondent's milk into New York or to regulate its sale or the price at which respondent may sell it in New York.*" 360 U. S. at 352 (emphasis added).

In the present case Wisconsin does clearly "essay" to regulate a rate charged in another state on an interstate sale. Such regulation was condemned in **Baldwin v. G. A. F. Seelig, Inc.,** 294 U. S. 511 (1935). There the Court stated that "New York has no power to project its legislation into Vermont by regulating the price to be paid in that state for milk acquired there" by a New York purchaser for resale in New York (294 U. S. at 521).

not the interest sought to be furthered thereby is otherwise legitimate, the attempted regulation is a nullity. It is only where the "exercise of local power serves to further a legitimate local interest but simultaneously burdens interstate commerce [that the court] is confronted with a problem of balance." **Great A & P Tea Co. v. Cottrell,** *supra,* 424 U. S. at 371.

Before there can be any consideration of a state's interest in regulating an interstate trader, there must be a determination of that state's power to regulate. In **National Bellas Hess,** the Commerce and the Due Process analyses were closely related, 386 U. S. at 756, both leading to the conclusion that, in the absence of any physical presence or local activities, Illinois lacked power to impose use tax collection duties upon National Bellas Hess. Likewise, in the instant case, the courts below were required to find upon virtually identical facts that, without reference to any interest which the state of Wisconsin might have in regulating Aldens' interstate sales to its residents, Wisconsin lacks the power to do so as long as Aldens is not physically present within the state.

Similarly, in **Allenberg Cotton Co. v. Pittman,** *supra,* this Court most recently reiterated the rule that state regulation of interstate trade requires not merely that the trader have physically entered the state as part of its interstate business, but that its local activities there be sufficiently separable from the conduct of its interstate business that it may be subjected to regulation by the state on the basis of these local activities.[10] *A fortiori,* if an

10. In this respect, the constitutional requirements for state regulation of the local activities of an interstate trader under the police power may actually be more stringent than for regulation pursuant to the state's taxing power. Thus, in **Allenberg,** the Court conceded that there might be local tax incidents of the same local activities as it held to be inseparable from the company's interstate business for purposes of state police power regulation. 419 U. S. at 33-34.

interstate trader has no physical presence whatever in a state, there can be no local activities sufficiently distinct from its interstate business to support state regulation.

B. The Court of Appeals' Attempt to Distinguish This Court's Decisions.

The Court of Appeals sought to avoid the holding of **National Bellas Hess,** by labeling that decision as a tax case, despite the fact, clearly asserted before it by petitioner, that Illinois sought to impose no tax on National but, rather, the duty to collect and transmit taxes from its customers and to maintain extensive records for the benefit of Illinois.[11]

Any doubt about the meaning of **National Bellas Hess** was laid to rest, however, by this Court's decision in **National Geographic Society v. California Board of Equalization,** — U. S. —, 45 U. S. L. W. 4343 (April 4, 1977), which, although handed down after the Court of Appeals' decision in this case, was brought to that court's attention by Aldens in its petition for rehearing en banc.

In **National Geographic** the Court not only reaffirmed the holding in **National Bellas Hess** that a state lacks the power to impose duties upon a mail order house which has no presence within that state, but did so in an opinion that made clear that both cases were regulatory, rather

11. Curiously, although the Court of Appeals for the Third Circuit also distinguished **Bellas Hess** as a tax case, both for "due process purposes," **Aldens, Inc. v. Packel,** 524 F. 2d at 43, and "under the commerce clause for the same reasons . . . ," *id.* at 49, it declined to consider "whether the more conventional separate [commerce clause] classification of [tax] cases is appropriate." *id.* at 49, n. 16, and, in fact, suggested elsewhere in its opinion, that the distinction between a tax case and one involving regulation "is not, or should not be, significant" at least in terms of the Commerce Clause, *id.* at 46.

than tax, cases. The Court in **National Geographic** explicitly distinguished the case before it from tax cases in that the out-of-state seller ran no risk of double taxation, but on the contrary, would become liable for the tax only by failing or refusing to collect it from the resident customer. Accordingly, "the sole burden imposed upon the out-of-state seller by [use tax] statutes . . . is the administrative one of collecting it." 45 U. S. L. W. at 4344.

Moreover, in rejecting **National Geographic's** argument that it should come within the **National Bellas Hess** rule because its local offices played no part in facilitating the sales on which it was being required to collect a use tax, the Court noted that such a showing might be "fatal to a direct tax," 45 U. S. L. W. at 4345, but held that test immaterial to "the imposition of the use tax collection duty." For that purpose, presence of local offices in the state was sufficient.

The court below likewise rejected the authority of **Allenberg** on the ground that it "concerns state regulation which may be generically deemed as an undue burden on interstate commerce." (552 F. 2d at 753, A30). Neither the language nor the sense of the **Allenberg** opinion, however, by any stretch of the imagination, supports such a view. There is absolutely no 'balancing' language in the Court's opinion. Neither is there any indication that the Court was applying a "per se" approach. Indeed, given its recent eschewing of "per se" approaches in Commerce Clause cases in **Complete Auto Transit, Inc. v. Brady,** — U. S. —, 45 U. S. L. W. 4359 (March 7, 1977), it would have been most unlikely for the Court to have so ruled. Moreover, this Court in no way limited its discussion in **Allenberg** to the particular kind of regulation involved there.[12]

12. In fact, as pointed out in the dissenting opinion of Mr. Justice Rehnquist, who alone considered a balancing approach to be relevant, ". . . the burden imposed on interstate commerce by

Rather, the Court declared impermissible any state regulation of a transaction which "though having intrastate aspects, was in fact 'a part of interstate commerce,'" 419 U. S. at 30, *quoting* **Dahnke-Walker Milling Co v. Bondurant,** 257 U. S. 282, 292 (1921).

Even though there was not in **Allenberg** the complete dearth of local activities which characterizes the instant case, *see* 419 U. S. at 34-35 (dissenting opinion), the Court held Allenberg's intrastate activities to be "fleeting events [which] are an integral first step in a vast system of distribution of cotton in interstate commerce," *id.* at 26, and which do not exhibit "the sort of localization or intrastate character" which is required to support state regulation. 419 U. S. at 33. The Court contrasted the situation in **Eli Lilly & Co. v. Sav-On-Drugs, Inc.,** *supra,* which did involve this "element of localization." 419 U. S. at 32. Accordingly, the Court held its decision in the earlier case "not in point." As the Court explained, "[s]ince [Lilly] was engaged in intrastate business it could be required to obtain a license even though it also did an interstate business." *Id.*

Initially, the court below sought to avoid **Allenberg** by holding that that case, unlike the present case, did not involve the police power:

> "Contrary to *Bellas Hess* and *Allenberg,* the case now before us is an exercise of the police power. As such it is inappropriate to treat it on a *per se* basis. . . ." (A30)

12. (Cont'd.)
such [qualification] statutes is to be judged with reference to the measures required to comply with such legislation, and not to the sanctions imposed for violation of it." 419 U. S. at 42 (dissenting opinion). Viewed in this light, the burden of the Mississippi statute could hardly be deemed very great, amounting to payment of a maximum fee of $500 and the filing of certain operating information with the state Secretary of State. *id.* at 42, n. 10.

Yet, it is inescapable that the exercise of power by Mississippi in **Allenberg** was in fact an exercise of the police power. The police power is defined in the following terms in 16 C. J. S. **Constitutional Law** § 174, p. 889:

> "Police power is the exercise of the sovereign right of a government to promote order, safety, health, morals, and the general welfare of society, within constitutional limits."

Surely, Mississippi's enactment of legislation denying access to its courts to any corporation which failed to qualify to do business in Mississippi was an enactment pursuant to the police power of that state.

Mr. Justice Rehnquist in his dissent in **Allenberg** supplies some insights:

> ". . . Union Brokerage recognized that qualification statutes were important in the collection of state taxes by identifying foreign corporations operating within the State and in the protection of citizens within the State through insuring ready susceptibility of the corporation to service of process. The qualification statute also serves an important informational function making available to citizens of the State who may deal with the foreign corporation details of its financing and control. . . ." 419 U. S. at 40-41 (Rehnquist, J., dissenting).

In footnotes 7 and 8, 419 U. S. at 41, Justice Rehnquist points out that such a statute operates as security for performance of the foreign corporation's obligations owed to citizens of the state and provides information concerning the financial structure and control of the corporation to any citizen who is considering doing business with the corporation. This is obviously an exercise of the police power designed to protect the citizens of the state.

Indeed, the court below, faced with this same reasoning in the petition for rehearing, plainly recognized that **Allenberg** was a police power case and modified its opinion to remove the statement to the contrary. *See* A33. Nevertheless, the court, having removed the reason for its holding that **Allenberg** does not control the present case, made no move to modify its conclusion. The result is simply an unreasoned rejection of a controlling decision of this Court.

There is no dispute that the *only* transactions involved in the instant case are Aldens' purely interstate sales from its offices in Illinois to its customers in Wisconsin. Nor has Aldens *any* physical presence in the state of Wisconsin which could possibly provide the "element of localization" upon which state regulation of interstate business must be predicated. Accordingly, under both **National Bellas Hess** and **Allenberg,** Wisconsin lacks the power to regulate petitioner, a company whose conduct ". . . asymptotically approaches that of the paradigm interstate trader," which cannot be subjected to state regulation.

C. The Policy Behind This Court's Decisions.

There is ample policy reason for this Court's protection of the pure interstate trader from local regulation. The company that remains an exclusively interstate mail order house pays a price for its decision. It foregoes the benefits of local advertising, a local telephone number to aid its customers in placing orders quickly and inexpensively, local retail stores and local catalog order desks or catalog stores at which potential mail order customers can view the actual merchandise they intend to buy, local servicemen to give customers assurance that damaged goods can be quickly and easily repaired locally by the supplier itself, prompt local delivery, and many

other benefits which local presence provides to the competitors of purely interstate traders and which the purely interstate trader foregoes in return for freedom from multi-state regulation of its interstate activities.

Nor are the burdens of multi-state regulation insignificant. Thus, for example, the vast majority of states regulate retail credit accounts, setting not only a variety of different limitations on finance charges, but providing an equally diverse set of regulations as to the language which must be included in retail credit agreements and even the size type which must be used for various parts of that language.[13] Different states require different and often conflicting methods of calculating the balance upon which finance charges may be calculated.[14] Advertising regulations are equally diverse. Many are the result of "little FTC" acts which create regulatory bodies whose actions lack even the widespread availability of state statutes;[15] the City of Chicago is so explicit in its regulations that it even requires that advertisements of sale prices contain an expiration date.[16] Many states prohibit the advertising of prescription drug prices,[17] whereas other states and the City of Boston require the posting of such prices.[18] Almost two-thirds of the states have statutes setting up a wide variety of rules governing collection practices,[19]

13. *See* 1 **Cons. Cred. Guide (CCH)** 1401-50 (1977).

14. *See* Office of Consumer Affairs, **State Consumer Action** 71, pp. 48-49 (1972).

15. *See id.* at p. 103.

16. Municipal Code of Chicago, § 100-29.6.

17. *See* Office of Consumer Affairs, **State Consumer Action** 74, p. 108 (1975).

18. *See id.;* Office of Consumer Affairs, **State Consumer Action** 71, p. 3 (1972).

19. *See* Office of Consumer Affairs, **State Consumer Action** 74, Ch. IX-X (1975).

many as detailed as New York City's prohibition against a creditor communicating with the employers of a debtor at any time before a judgment has been obtained.[20] New York State has a statute governing undelivered mail order merchandise.[21] The range is legion.

If every mail order seller who wishes to undertake systematic solicitation of the national market in accordance with the constitutional guarantees of the Commerce Clause and our federal system must comply with such a welter of divergent, unsystematic and occasionally conflicting regulations imposed by increasing numbers of states and municipalities, the police power of the states will have become a bar to free entry into the interstate mail order business by the small retailer and an intolerable burden to those retailers, large and small, who are already in the field.

20. *See* Office of Consumer Affairs, **State Consumer Action** 71, pp. 48-49 (1972).

21. **N. Y. Gen. Bus. Law** (McKinney) § 396-M(d)(i) (1975).

CONCLUSION.

For the reasons set forth above, we respectfully urge that this petition for a writ of certiorari to the United States Court of Appeals for the Seventh Circuit be granted.

Respectfully submitted,

BERNARD G. SEGAL,
RALPH S. SNYDER,
JAMES D. CRAWFORD,
Attorneys for Petitioner.

SCHNADER, HARRISON, SEGAL & LEWIS,
1719 Packard Building,
Philadelphia, Pennsylvania, 19102

DONALD L. HEANEY,
ISAKSEN, WERNER, LATHROP & HEANEY,
122 West Washington Avenue,
Madison, Wisconsin, 53703

RAYMOND N. FRIEDLANDER,
5000 W. Roosevelt Road,
Chicago, Illinois, 60607

Of Counsel.

Dated: July 25, 1977

Appendix.

OPINION OF THE DISTRICT COURT

IN THE
UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WISCONSIN

72-C-405

ALDENS, INC., an Illinois Corporation,

v. *Plaintiff,*

ROBERT W. WARREN, individually and as Attorney General for the State of Wisconsin, and ERICH MILDENBERG, individually and as Commissioner of Banking, State of Wisconsin,

Defendants.

OPINION AND ORDER

This is an action for declaratory judgment. Plaintiff, an Illinois corporation engaged in the business of selling merchandise by mail-order, seeks an order of the court declaring that any attempt by the State of Wisconsin to regulate plaintiff's revolving charge account plan and the agreements and transactions thereunder, is a violation of the United States Constitution. Plaintiff asserts that, as applied to its revolving charge account plan, the Wisconsin laws violate the Commerce and Postal Clauses of Article I, Section 8, the Supremacy Clause of Article VI, and the First and Fourteenth Amendments to the United States Constitution. Defendants seek a declaratory judgment holding that plaintiff's revolving charge account and

the agreements and transactions thereunder between plaintiff and its Wisconsin mail order customers constitutionally can be regulated by the State of Wisconsin.

The action is presently before the court on cross motions for summary judgment. Counsel have submitted a stipulation of facts and the affidavit of the Administrator of the Division of Consumer Credit, office of the commissioner of Banking, State of Wisconsin. From the pleadings, the stipulation of fact and the affidavits, I find that there is no genuine issue as to the following facts:

FACTS

1. Defendant Warren is the Attorney General of Wisconsin and Defendant Mildenberg is the Wisconsin Commissioner of Banking. Defendants are responsible for the enforcement of the Wisconsin Consumer Act which became effective March 1, 1973.

2. Aldens, Inc. is an Illinois corporation with its only physical location in Chicago, Illinois. The business was established in Chicago in 1902 and has been conducted as a general retail merchandise mail order business in Chicago ever since.

3. Aldens sells merchandise to customers who reside in all fifty states. The customers pay the transportation costs.

4. The credit agreement in use nationally by Aldens provides that it is an Illinois contract governed by Illinois law. The credit agreement provides for a monthly finance charge of 1.75% (Annual Percentage Rate of 21%), which exceeds the rate permitted by Sec. 422.201 Wis. Stats. The credit agreement is valid under Illinois law and complies with Federal Truth-in-Lending.

5. Aldens retains a purchase money security interest in merchandising sold pursuant to the credit agreement

with its customers. The retention of title provision is contained in said agreement to conform to Aldens' accounting practices and to inform customers of Aldens' security interest in unpaid for merchandise. Aldens files no financing statement or security agreement and does not enforce said security interest.

6. Credit is granted only in Chicago and orders are accepted only in Chicago.

7. All payments are made to Aldens in Chicago.

8. With the adoption of the Wisconsin Consumer Act (Chapters 421 to 427 Wis. Stats. 1971) effective March 1, 1973, in view of the civil and criminal penalties provided therein for violation thereof, Aldens has determined that it must comply with said Act pending the outcome of this litigation.

9. Approximately 2.34% of Aldens' annual sales are made to Wisconsin customers. Aldens makes sales of approximately $4,600,000 per year to Wisconsin customers. Approximately 27% of this amount is derived from cash sales and 73% from credit sales. Aldens has approximately 23,000 Wisconsin credit customers; the average credit account balance is $164.81. It is probable that the sales to and the number of Wisconsin customers will increase.

10. In complying with the Wisconsin Consumer Act Aldens is incurring annual costs, expenses and revenue losses in excess of the following:

a. Additional cost of preparing catalogs and advertising materials containing Wisconsin credit terms	$ 51,000
b. Special computer processing and handling costs for Wisconsin customers in setting up accounts and producing monthly billing statements	$ 13,700

c. Loss of revenue on elimination of minimum charges	$ 7,200
d. Loss of revenue on account of Wisconsin finance charge rate	$ 92,000
TOTAL	$163,900

11. Other general retail merchandise credit grantors have incurred and will incur costs and expenses connected with Wisconsin Consumer Act compliance. The Act allows many credit grantors to increase the rate of finance charge and requires some to reduce rates. The increased rates for some credit grantors will more than off-set the cost of compliance. For others, and particularly those which must lower rates, compliance will involve costs, expenses and loss of revenue to a greater or lesser degree, depending upon the credit grantor.

12. Aldens does not have in Wisconsin any office, distribution house, sales house, warehouse or any other place of business.

13. Aldens does not have in Wisconsin any agent, salesman, canvasser, soliciter or other type of representative to sell or take orders, to deliver merchandise, to accept payments or to service merchandise it sells.

14. Aldens does not own any tangible property, real or personal, in Wisconsin.

15. Aldens supplies to the purchasers of lawn and garden equipment, storage buildings, air conditioners, major appliances, and mini- and trail-bikes by contract with Illinois Bell Company, a telephone service to Chicago which the customers may use toll-free for inquiries concerning the operation and servicing of these purchases.

16. Aldens does not solicit Wisconsin customers by telephone and has no telephone listing in Wisconsin. It does not advertise its merchandise by placing ads in Wisconsin newspapers, on billboards in Wisconsin or by placing advertisements with Wisconsin radio or television stations.

17. Aldens does not collect and remit the Wisconsin Use Tax.

18. Aldens mails catalogs to Wisconsin residents about 4 times per year and, in addition, mails them "flyers," which are supplemental advertisements of merchandise, 6 to 8 times per year. Aldens includes advertising material with the customer's monthly billing statement. The catalogs and "flyers" are mailed to Aldens' active Wisconsin customer list of about 65,000 names and inactive customer list of about 9,000 names. In addition, Aldens rents mailing lists from mailing list brokers (not Wisconsin firms). In the spring of 1973, catalogs and "flyers" were to be mailed to about 350,000 Wisconsin residents on those lists. There may be some duplication between the mailings to names on the rented lists and the mailings to Aldens customer lists. All Aldens mailings are to named individuals and none are to "resident" or "occupant."

19. Aldens rejects about 40% of the new credit applications it receives and about 6% of the orders received from current credit customers. Aldens' procedures used in determining credit worthiness involve the weighing of the answers to the items of information called for in the Charge Application. About 24% of the applications are approved on the basis of these answers and about 32% are rejected. About 23% of the applications are checked against a national credit index service located in New

Jersey and about 21%, by arrangement with a Chicago, Illinois credit reporting agency, are checked by phoning credit bureaus in Wisconsin for in-file checks of their records. On the basis of these checks, about 36% more applications are accepted and about 8% rejected.

Recapitulation:

Total Acceptances	60%
Total Rejections	40%

The 6% rejection rate on orders received from current credit customers is based substantially on the determination that the order exceeds the customer's established credit limit or that the customer's account is delinquent at the time the order is placed.

20. Credit application forms for credit accounts with Aldens and credit agreement forms are among the materials mailed by Aldens to persons within the State of Wisconsin; credit application forms are completed and credit agreements are signed by Wisconsin residents in Wisconsin and are mailed in Wisconsin to Aldens at its office in Chicago, Illinois.

21. Merchandise sold to Wisconsin customers is sent to them by deposit in the United States Mail or delivery to a common carrier in Chicago, or by shipment from some other point outside the State of Wisconsin.

22. Monthly statements are mailed in Chicago by Aldens to Wisconsin credit customers following the purchase of merchandise. These statements set forth the charges to the customer's account and require payment thereof by a stated date to avoid the assessment of finance charges.

23. Monthly payments for merchandise purchased and finance charges assessed under Aldens' credit plan are mailed in Wisconsin to Aldens in Chicago by Wisconsin customers.

24. In the event the customer becomes delinquent in the payment of his account Aldens attempts to collect the account using letters and other communications mailed from Chicago addressed to the customer in Wisconsin, and when appropriate, telephones the Wisconsin customer, from Chicago, to discuss the account and request payment.

25. All Aldens' efforts to collect Wisconsin accounts are conducted in Chicago, Illinois or as stated in the following paragraph.

26. After an account has been delinquent for 6 months, Aldens writes it off as a bad debt. Aldens turns over less than half of the Wisconsin written off accounts (about 2% of its Wisconsin receivables) to Illinois or Minnesota independent collection agencies for collection.

27. The fee provisions of the Wisconsin Consumer Act are necessary for its administration.

OPINION

Plaintiff's counsel has advised the court that plaintiff has challenged state regulatory laws similar to those of Wisconsin in an action commenced in the United States District Court for the Middle District of Pennsylvania. The Pennsylvania district court denied plaintiff's request for judgment in that proceeding, holding that the Pennsylvania Act was constitutional as applied to plaintiff's mail order credit transactions with Pennsylvania residents. *Aldens v. Packel*, 379 F. Supp. 521 (M. D. Pa. 1974). Plaintiff appealed the district court decsion to the United

States Court of Appeals for the Third Circuit, which affirmed the lower court's ruling that the Pennsylvania law was constitutional. *Aldens v. Packel*, – F. 2d –, 3d Cir., decided August 27, 1975. A petition for a writ of certiorari to the United States Supreme Court is pending.

Plaintiff's counsel has advised this court that there are no significant differences in the facts which were the subject of stipulations in this proceeding and in the action in Pennsylvania. Plaintiff's counsel concede also that the differences between the Wisconsin and Pennsylvania statutory schemes are not material to the litigation.[1]

1. Pennsylvania's Goods and Services Installment Sales Act (69 P. S. § 1103) contains the following provisions:

"For the purposes of this act a retail installment contract, contract, retail installment account, installment account, or revolving account is made in Pennsylvania and, therefore, subject to the provisions of this act if either the seller offers or agrees in Pennsylvania to sell to a resident buyer of Pennsylvania or if such resident Pennsylvania buyer accepts or makes the offer in Pennsylvania to buy, regardless of the situs of the contract as specified therein.

Any solicitation or communication to sell, verbal or written, originating outside the Commonwealth of Pennsylvania but forwarded to and received in Pennsylvania by a resident buyer of Pennsylvania shall be construed as an offer or agreement to sell in Pennsylvania.

Any solicitation or communication to buy, verbal or written, originating within the Commonwealth of Pennsylvania, from a resident buyer of Pennsylvania, but forwarded to and received by a retail seller outside the Commonwealth of Pennsylvania shall be construed as an acceptance or offer to buy in Pennsylvania."

The Wisconsin statute reads in pertinent part as follows:

• • •

"(2) For the purposes of this act, a consumer transaction or modification of a consumer transaction is made in this state if:

• • •

(b) The merchant induces the customer who is a resident of this state to enter into the transaction by face-to-face solicitation or by mail or telephone solicitation directed to the particular customer in this state."

• • •

I have reviewed the decisions of both the district court and the court of appeals. The opinions are lucid and persuasive expositions of the law. I agree with the conclusion reached by both courts that a state may enact and enforce a statutory scheme for the purpose of protecting its own residents from what it considers to be the unfair credit practices of merchants and sellers and that the application of such statutory schemes to large mail order merchandisers which solicit millions of dollars of business from the state's own residents is not a violation of any provision of the United States Constitution.

I see no need to discuss in detail the legal arguments made by counsel in this proceeding, as the Pennsylvania federal courts have already done so. However, brief comment may be appropriate as to the issues raised in plaintiff's petition for a writ of certiorari to the Third Circuit, a copy of which has been submitted to this court, and as to the facts peculiar to the Wisconsin proceeding.

In that petition, plaintiff places great emphasis upon its contention that the exclusively interstate aspect of its credit transactions preclude any state regulation of those transactions. Plaintiff asserts that the opinions of the Pennsylvania federal courts represent "the farthest advance of state power to regulate interstate commerce ever to reach this Court," because in plaintiff's case, the state is attempting to regulate the terms and conditions of mail order sales contracts consummated outside the state by a

1. (Cont'd.)

"(3) With respect to a transaction pursuant to an open-end credit plan, this act applies if the customer is a resident of this state and the open-end creditor or a merchant honoring a credit card issued by the open-end creditor, is a resident of this state or furnishes, mails or delivers the goods, services or credit to a resident of this state while the customer is within this state or receives a writing signed by the customer and evidencing the transaction in this state."

firm which has no local activities of any kind in the regulating state. Plaintiff asserts that its business activity falls into an area of "pure interstate commerce" which is subject only to regulation by the federal government since it involves no local activity which would justify state regulation.

As I understand plaintiff's argument, it is this: both the Due Process Clause and the Commerce Clause preclude the states from applying their legislation to business activities carried on exclusively outside their state; the Due Process Clause requires that regulated interstate businesses must have at least "minimal contacts" with the regulating state, but the Commerce Clause imposes more stringent requirements as to the connections which the regulating state must have with an interstate business in order to justify state regulation. Plaintiff contends that in the absence of sufficient local activity, any regulation of interstate commerce is prohibited by the *per se* effect of the Commerce Clause.

If one accepts plaintiff's basic premise that its business activities are "pure interstate commerce" and that it has no local activity within this state, then plaintiff's challenge to the Wisconsin Consumer Act would have considerable weight. I cannot accept the basic premise on which plaintiff's challenge rests. Plaintiff's activity in Wisconsin constitutes a concerted, systematic exploitation of the Wisconsin market. Plaintiff solicits business from the residents of this state through mailings directed to approximately 65,000 state residents who are listed on plaintiff's active customer lists. Additional mailings are made to as many as 350,000 state residents. Plaintiff deals on a regular basis with about 23,000 state residents to whom it makes sales of about $4,600,000 of which approximately 73% are credit sales. Plaintiff mails credit

application forms and credit sales agreement forms to Wisconsin residents. The forms and agreements are completed in this state by the Wisconsin resident before they are mailed to plaintff in Chicago. Plaintiff's determination of the credit standing of Wisconsin customers sometimes involves telephoning credit bureaus located in this state to make file checks of those customers.

The Wisconsin statute at issue herein is part of a comprehensive revision of the state's consumer credit laws entitled the Wisconsin Consumer Act and enacted as Chapter 421-427 of the Wisconsin Statutes. The Act's purposes and policies are set forth in § 421.102(2) which provides:

> "(2) The underlying purposes and policies of this act are:
>
> (a) To simplify, clarify and modernize the law governing consumer transactions;
>
> (b) To protect customers against unfair, deceptive, false, misleading and unconscionable practices by merchants;
>
> (c) To permit and encourage the development of fair and economically sound consumer practices in consumer transactions; and
>
> (d) To coordinate the regulation of consumer credit transactions with the policies of the federal consumer credit protection act."

Plaintiff does not dispute the proposition that its contacts with Wisconsin residents are sufficient to give the courts of this state personal jurisdiction over the corporation without violating plaintiff's due process rights. *International Shoe v. State of Washington*, 326 U. S. 310 (1945); *Zerbel v. H. L. Federman & Co.*, 48 Wis. 2d 54

(1970). Plaintiff asserts, however, that judicial jurisdiction is something quite distinct from jurisdiction for regulatory purposes and that the opinion of the United States Supreme Court in *National Bellas Hess v. Department of Revenue*, 386 U. S. 753 (1967) prohibits the states from applying their substantive law to transactions which take place out-of-state.

In my opinion, *National Bellas Hess* is clearly distinguishable from the present case. In *National Bellas Hess* the State of Illinois would have required a Missouri mail order merchandiser to collect and remit the Illinois use tax on sales made to Illinois residents. Taxation and the collection of taxation have long been regarded as obligations which may be imposed only on those who enjoy the benefits of living or operating a business within the taxing unit. The Supreme Court found that National Bellas Hess did not receive benefits from the State of Illinois which would justify requiring the company to act as a tax collector for the state of Illinois and for the myriad of independent taxing units within the state.

The level of state activity which would justify taxation is of a far greater magnitude than the level of activity which justifies the application of state statutes seeking to protect the public health or welfare. As the district court in Pennsylvania noted, the states constitutionally can regulate highway speed of trucks engaged solely in interstate commerce or control the emission of smoke from ships in their ports. *South Carolina State Highway Department v. Barnwell Bros.*, 303 U. S. 177 (1938); *Huron Portland Cement Co. v. City of Detroit*, 362 U. S. 440 (1960). While these cases involve physical presence within the state, I have no doubt that a state can act to protect the public welfare from activities affecting the state on the scale of plaintiff's, even though those activities involve no physical presence. Although plaintiff's contacts with the state of Wisconsin are not such as would justify taxation, they are considerably greater than the minimal contacts which would provide a basis for judicial jurisdiction. There is no violation of due process in subjecting plaintiff to the provisions of the Wisconsin Consumer Act.

Nor am I persuaded that, independently of the Due Process Clause, the Commerce Clause prohibits the state of Wisconsin from regulating plaintiff's credit transactions with Wisconsin residents. As I noted earlier, plaintiff's activity cannot be characterized as exclusively of an interstate nature. It is activity which is deliberately and carefully directed into this state.

Plaintiff argues that the Commerce Clause prohibits the states from regulating transactions which are part of interstate commerce, even though there may be intrastate aspects of the transaction. Plaintiff contends that in *Allenberg Cotton Co. v. Pittman*, 419 U. S. 20 (1974) the Court rejected the "balancing test" which it had used earlier to weigh the state's interest in regulating intrastate aspects of interstate transactions against the national interest in maintaning the fee flow of commerce. A careful reading of *Allenberg*, however, reveals an unarticulated, but implicit, balancing of interests. The interest of the state of Mississippi in denying court access to non-qualifying corporations was clearly out-weighed by the national interest in maintaining the integrity of the cotton market.

Plaintiff's argument harkens back to an era characterized by Justice Rehnquist as one "when the approved judicial technique was to decide whether a subject was or was not interstate commerce; if it was, Congress alone could regulate it, and if not, only the states could.'" *Allenberg Cotton Co. v. Pittman, supra*, at 38-39, Rehnquist,

J., dissenting, quoting Stern, The Commerce Clause and the National Economy, 1933-1946, 59 Harv. L. Rev. 645, 648 (1946). Justice Rehnquist points out that the "doctrine of mutual exclusively" has been dispelled by such cases as *South Carolina Highway Dept. v. Barnwell Bros., supra.* The fact that a transaction is a part of interstate commerce no longer prohibits the states from regulating the intrastate aspects of the transaction.

In a more recently decided case, *The Great Atlantic & Pacific Tea Company, Inc. v. Cottrell,* — U. S. — (1976) 44 L. W. 4240, the Supreme Court reiterated its holding in *H. P. Hood & Sons, Inc. v. Du Mond,* 336 U. S. 525 (1949), that the states retain "broad power" to legislate protection for their citizens in matters of local concern, "and that not every exercise of local power is invalid because it affects in some way the flow of commerce between the states." *Id.* at 4241.

The Third Circuit correctly applied the "balancing test" to the Pennsylvania law, concluding that the law neither discriminated against persons engaged in interstate commerce nor unduly burdened interstate commerce. There is nothing in the Wisconsin law nor in the facts concerning plaintiff's operations in Wisconsin which would compel a different result from that reached by the Third Circuit.

From my review of the facts and law in this case, I am persuaded that the federal courts in Pennsylvania made the correct disposition of plaintiff's claims. I adopt as my own the reasoning of the Court of Appeals for the Third Circuit.

On the basis of the foregoing discussion, IT IS ORDERED that plaintiff's motion for summary judgment is DENIED; defendants' motion for summary judgment is GRANTED. It is the judgment of this court that the revolving charge account plan, agreements and transactions thereunder between plaintiff and its Wisconsin mail order customers can constitutionally be regulated or governed by the laws of the State of Wisconsin and that the laws of the State of Wisconsin, as applied to the revolving charge account plan, agreements and transactions thereunder between plaintiff and its Wisconsin mail order customers, do not violate the Commerce Clause or Postal Clause of Article I, Sec. 8, Supremacy Clause of Article VI, the First Amendment or Section 1 of the Fourteenth Amendment of the United States Constitution.

Entered this 16th day of March, 1976.

BY THE COURT:

JAMES E. DOYLE
District Judge

OPINION OF THE COURT OF APPEALS.

IN THE

United States Court of Appeals

FOR THE SEVENTH CIRCUIT

No. 76-1396

ALDENS, INC.,

Plaintiff-Appellant,

v.

BRONSON C. LAFOLLETTE, individually and as Attorney General for the State of Wisconsin, and ERICH MILDENBERG, individually and as Commissioner of Banking State of Wisconsin,

Defendants-Appellees.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WISCONSIN.
No. 72-C-402—JAMES E. DOYLE, *Judge.*

ARGUED NOVEMBER 4, 1976—DECIDED MARCH 25, 1977

Before CUMMINGS and TONE, *Circuit Judges,* and CAMPBELL, *Senior District Judge.*[*]

CUMMINGS, *Circuit Judge.* Plaintiff is an Illinois corporation engaged in the business of selling merchandise by mail order. In the court below, plaintiff sought a declaratory judgment that Wisconsin could not constitutionally regulate its revolving charge account plan and agreements and transactions thereunder. In particular, plaintiff asserted that the application to Aldens of the Wisconsin Consumer Act (Wis. Stats. Title XL, Chaps. 421-427; W. S. A. 421-427)[1] should be declared unconstitutional under the Commerce Clause of Article I, § 8, and the Due Process Clause of the Fourteenth Amendment.[2]

A stipulation of facts and an affidavit of the Administrator of the Division of Consumer Credit of the Office of the Commissioner of Banking of Wisconsin were filed in the district court, and both parties filed motions for summary judgment. In March 1976, the district court handed down an unreported opinion and order granting summary judgment to the defendants.

The Wisconsin Consumer Act was designed to protect its residents from abuses in credit transactions. W. S. A. 421.102(2). One section of the Act provides that 18% per annum should be the maximum permissible finance charge for extension of credit under open-end credit plans such as Aldens offers.[3] This ceiling was established to prevent overreaching and was made applicable to all credit grantors competing in the Wisconsin

[*] Senior District Judge William J. Campbell of the Northern District of Illinois is sitting by designation.

1. Section 428, concerning first lien real estate loans, was added to the Act in 1973 after the filing of the complaint and is not material to the issues in this case. L. 1973, c. 18, § 4, effective April 22, 1973. 1973 Wis. Leg. Serv. 32-34.

2. In its complaint, the plaintiff also attacked the Wisconsin statute on the ground that it violated the postal clause of Article I, Section 8, Supremacy Clause of Article VI, and the First Amendment. On appeal, the attack is limited to the Commerce and Due Process Clauses.

3. An open-end credit plan is defined in W. S. A. 421.301(27) as that situation where a creditor allows a customer "to make purchases * * * from time to time, directly from the creditor" and the customer "has the privilege of paying the balance in full or in installments" and the creditor may compute a finance charge "from time to time on an outstanding unpaid balance."

market. The Act applies to transactions involving Wisconsin consumers and open-end creditors who mail or deliver goods, services or credit to a Wisconsin resident while the customer is within that state. In short, the Consumer Act applies to out-of-state firms that conduct business by mail with Wisconsin residents within Wisconsin.[4] There are no federal laws or regulations for a retailer's maximum finance or penalty charges.

In its opinion granting summary judgment to defendants, the district court court set out the salient facts as follows: The two defendants are the Attorney General of Wisconsin and its Commissioner of Banking. They are responsible for the enforcement of the Wisconsin Consumer Act. Plaintiff, an Illinois corporation, has conducted a general retail merchandise mail order business from Chicago, Illinois, since 1902 and sells merchandise to customers in all fifty states. The buyer pays the transportation costs.

Aldens' only physical presence is in Chicago. It has no Wisconsin office or other place of business and has no representative or tangible property there. Aldens does

4. The section on territorial application provides in pertinent part:

"(2) For the purpose of this act, a consumer transaction or modification of a consumer transaction is made in this state if:

• • •

"(b) The merchant induces the customer who is a resident of this state to enter into the transaction by face-to-face solicitation or by mail or telephone solicitation directed to the particular customer in this state.

"(3) With respect to a transaction pursuant to an open-end credit plan, this act applies if the customer is a resident of this state and the open-end creditor or a merchant honoring a credit card issued by the open-end creditor, is a resident of this state or furnishes, mails or delivers the goods, services or credit to a resident of this state while the customer is within this state or receives a writing signed by the customer and evidencing the transaction in this state." W. S. A. 421.201.

not advertise in the Wisconsin media and has no Wisconsin telephone listing although a toll-free Illinois number is provided to its customers. Indeed, Aldens is not required to collect and remit the Wisconsin use tax.

Aldens mails catalogs to Wisconsin residents four times a year and also mails them supplemental advertisements six to eight times a year. In the spring of 1973, it solicited approximately 350,000 Wisconsin residents by mailing them catalogs and "flyers." Aldens' active Wisconsin customer list contains 65,000 names and its inactive customer list sets forth another 9,000.

The credit application forms for credit accounts and credit agreement forms are mailed by Aldens to Wisconsin residents. These forms and agreements are signed by Wisconsin residents in that state and are mailed from there to Aldens in Illinois. Aldens then determines the credit worthiness of the Wisconsin customer through a procedure that sometimes includes phoning Wisconsin credit bureaus. Aldens rejects about 40% of all its new credit applications and 6% of all orders received from current credit customers. Credit is granted only in Chicago and orders are only accepted there.

Aldens' sales to Wisconsin customers average $4,600,000 per year, with 73% of this amount derived from credit sales. Aldens has approximately 23,000 Wisconsin credit customers with an average credit account balance of $164.81. 2.34% of its annual sales are made to Wisconsin customers. It is probable that sales to, as well as the number of, Wisconsin customers will increase.

Aldens retains a purchase money security interest in merchandise sold pursuant to the credit agreements with its customers. However, it files no financing statement or security agreement and does not enforce this security interest. Merchandise sold by Aldens to Wisconsin cus-

tomers is sent to them by mail or common carrier from Chicago or by shipment from some other place outside Wisconsin. Aldens mails its monthly statements in Chicago to its Wisconsin credit customers following their purchases of merchandise. These statements set forth the charges to the customer's account and require payment by a stated date to avoid the assessment of finance charges. All monthly payments for merchandise purchased and finance charges assessed are mailed in Wisconsin to Aldens in Chicago by its Wisconsin customers. If a Wisconsin customer becomes delinquent in paying his account, Aldens attempts to collect it through letters and other communications mailed from Chicago to the customer in Wisconsin and sometimes by telephone from Chicago to the Wisconsin customer. If an account has been delinquent for six months, Aldens writes it off as a bad debt. It turns over half of the Wisconsin written-off accounts to Illinois or Minnesota independent collection agencies for collection.

Aldens' National Credit Agreement provides that it is an Illinois contract permitted by Illinois law and specifies a monthly finance charge at the annual percentage rate of 21%, in excess of the 18% permitted by W. S. A. 422.221.[5] The credit agreement is valid under Illinois law and the Federal Truth in Lending Act (15 U. S. C. §§ 1601-1665).

In presently complying with the Wisconsin Consumer Act, Aldens incurs the following annual costs, expenses and revenue losses:

a. Additional cost of preparing catalogs and advertising materials containing Wisconsin credit terms

$51,000

5. Pending the outcome of this litigation, Aldens has adopted a credit agreement for use of its Wisconsin customers that complies with the Wisconsin Consumer Act.

b. Special computer processing and handling costs for Wisconsin customers in setting up accounts and producing monthly billing statements

13,700

c. Loss of revenue on elimination of minimum charges

7,200

d. Loss of revenue on account of Wisconsin finance charge rate

92,000

TOTAL $163,900

I

Aldens maintains, in short, that it is the quintessential interstate trader with no objective manifestation of itself extant within Wisconsin. Therefore Aldens argues that the Due Process Clause of the Fourteenth Amendment and the Commerce Clause positively deny Wisconsin the power to regulate its operations. Moreover, even if power to regulate Aldens exists, Aldens argues that federalist considerations prevent its exercise here. We shall consider these constitutional arguments in reverse order.

II

The federalist argument appeals to a pair of hoary constitutional doctrines. The argument's first branch calls on the Commerce Clause cases which invalidate state regulation of a trader in interstate commerce if his regulation together with that of other traders similarly situated would place an undue burden upon interstate commerce. Its second prong draws on the line of cases which recognize a due process limitation on the extraterritorial exer-

cise of a state's legislative power. If we were presented with these interest-balancing-based arguments as applied to Aldens on first impression, their resolution would not be a trivial matter.[6] However, prior cases involving Aldens make any independent exegesis on our part totally pointless.

Before this case was decided by Judge Doyle, a companion case was filed by Aldens seeking a declaratory judgment that the similar Pennsylvania Goods and Services Installments Sales Act was unconstitutional as applied to Aldens. However, its Commerce Clause and Due Process arguments were rejected. *Aldens, Inc. v. Packel,* 379 F. Supp. 521 (M. D. Pa. 1974). A year later, the Court of Appeals for the Third Circuit affirmed (424 F. 2d 38), and certiorari was subsequently denied. 425 U. S. 943. Judge Gibbons' well-considered opinion for the Third Circuit thoroughly discusses the balancing issues raised on appeal before us. We fully agree with his disposition and adopt his opinion as our own.[7]

Subsequent to the decision below, the United States District Court for the Western District of Oklahoma filed a memorandum opinion that comparable provisions of the Oklahoma statutes do not violate the Commerce or Due Process Clauses. *Aldens, Inc. v. Ryan,* No. CIV-75-0458-D, decided June 14, 1976. An appeal is now pending before

6. This is a case where the basic premise of the Commerce Clause interest-balancing line of reasoning would be present, *viz.*:

> "[a] State interfer[ing] with the natural functioning of the interstate market either through prohibition or through burdensome regulation." *Hughes v. Alexandria Scrap Corp.,* 426 U. S. 794, 806.

7. In the court below, Judge Doyle also adopted the reasoning of the Court of Appeals for the Third Circuit in *Aldens, Inc. v. Packel.* Because a petition for certiorari was then pending, his opinion, with which we are fully in accord, commented on the issues raised in Aldens' petition for writ of certiorari to the Third Circuit. Since that petition was denied, we need not consider it.

the Tenth Circuit. We are also in accord with District Judge Daughtery's reasoning.

The relevant post-*Packel* Supreme Court Commerce Clause opinions which invalidate state legislation as unduly burdensome on interstate commerce are fully consistent with our result on the balancing issue. *Great Atlantic & Pacific Tea Co. v. Cottrell,* 424 U. S. 366, 370-372 and n. 6 reaffirms the *Pike v. Bruce Church, Inc.*[8] rule that state regulations involving a legitimate local interest are not invalid because they affect interstate commerce unless the burden on such commerce is, on balance, clearly excessive in relation to the local benefits. *Dixie Dairy Co. v. City of Chicago,* 538 F. 2d 1303 (7th Cir. 1976). A balancing inquiry reveals no such burden here. See *Aldens, Inc. v. Packel, supra,* 524 F. 2d at 47-50.

Boston Stock Exchange v. State Tax Commission, — U. S. —, 45 LW 4093, recently invalidated a tax discriminating against interstate commerce but did not involve the exercise of state police power for the protection of state citizens. The police power of a state and its power to tax are of course treated differently for constitutional purposes. See *Freeman v. Hewitt,* 329 U. S. 249, 253. Unlike the exercise of a state's police power which is sustainable absent an undue burden on interstate commerce which is clearly excessive in relation to local benefits, *Great Atlantic & Pacific Tea Co. v. Cottrell, supra,* "extraterritorial impositions of tax collection obligations have been upheld only when it can be said that a benefit has been conferred on the tax collector by virtue of the state's sovereignty, and the tax is related to that benefit." *Aldens, Inc. v. Packel, supra,* 524 F. 2d at 43-44; *Colonial Pipeline Co. v. Traigle,* 421 U. S. 100, 108. But it is Wisconsin's police power, exercised to protect its citizen-consumers from oppressive credit terms, which is implicated here.

8. 397 U. S. 137, 142.

The question of taxation of business in interstate transactions is not involved. The Wisconsin Consumer Act merely regulates plaintiff's dealings with Wisconsin residents and the only fee imposed is to cover the costs of administering the Act. W. S. A. 426.202. Judge Doyle found that the fee provisions of the Act in fact were necessary for its administration. Therefore, the *Boston Stock Exchange* case is of no help to Aldens. Thus federalist considerations do not permit this regulation.

III

Aldens' most vigorous constitutional attack questions the very existence of Wisconsin's power to regulate a purely interstate trader. To be sure, if not fully equivalent, Aldens' conduct asymptotically approaches that of the paradigm interstate trader. But so long as the interstate trader's conduct has a "connection in fact" with a state producing an effect within a state, the interstate character of his conduct is only an element of the interest-balancing analysis of the "federalist" arguments just addressed. *Nippert v. Richmond*, 327 U. S. 416, 423-424. Most especially in the exercise of the police power, state sovereignty is, in many areas of interstate commerce, parallel to and concurrent with that of the federal government. *Huron Portland Cement Co. v. City of Detroit*, 362 U. S. 440, 442; *California v. Thompson*, 313 U. S. 109, 112-113; see *National League of Cities v. Usery*, 426 U. S. 833, 840-845. As we demonstrate below, nothing in the Due Process Clause or the Commerce Clause casts doubt on this tenet of federalism.

A. *Due Process Clause*

State sovereignty is not absolute. State power can only be exercised against a person within the confines of

due process of law drawn by its procedural and substantive aspects. However, since substantive due process is now limited to a commitment to fundamental fairness (*Whalen v. Roe*, — U. S. —, —, 45 LW 4166, 4167-4168), substantive due process analysis is generally academic because the application of any regulation which is fundamentally unfair also would not withstand a procedural analysis. Here Aldens argues that substantive due process independently denies Wisconsin the jurisdiction to prescribe those portions of the Wisconsin Consumer Act which apply to interstate mail order houses.[9] Cf. *Rivard v. United States*, 375 F. 2d 882, 885 (5th Cir. 1967), certiorari denied, 389 U. S. 884.

Undoubtedly, substantive due process imposes a floor on the nexus between a person and his practices relative to a state which will be sufficient to support legislation running against him.[10] Cf. *Pacific Seafarers, Inc. v. Pacific Far East Line, Inc.*, 404 F. 2d 804, 815 (D. C. Cir. 1968), certiorari denied, 393 U. S. 1093. And the connection between a state and the regulated person must be of a more substantial character than the "minimum contacts" needed to support judicial process running against a per-

9. Aldens makes the following distinction: "Judicial jurisdiction to enforce the terms of a contract entered into in another state is vastly different from the legislative power which is required to dictate the substantive terms of the contract at its inception. It is the fundamental difference of enforcing the contract in Wisconsin as it was entered into in Illinois on the one hand and establishing the substantive terms of that contract as it was made in Illinois on the other hand that is the very essence of the difference between service of process cases and cases with sufficient contacts to sustain regulatory jurisdiction which can change or dictate the terms of the contract." (Reply Br. at 8.)

10. Suppose that many Wisconsin citizens have summer homes in Minnesota. Wisconsin could not regulate Aldens' credit terms in mailings to Wisconsin citizens at their Minnesota summer addresses. *New York Life Ins. Co. v. Dodge*, 246 U. S. 357, 376-377; *Hartford Accident & Indemnity Co. v. Delta & Pine Land Co.*, 292 U. S. 143.

son. *Travelers Health Assn. v. Virginia,* 339 U. S. 643, 652-653 (Douglas, J., concurring); cf. Comment, Corporate Registration: A Functional Analysis of "Doing Business," 71 Yale L. J. 575, 585-586 nn. 54 and 56 (1962). But by now "objective territoriality," at least in domestic cases, is beyond argument, *viz.*:

> "any state may impose liabilities, even upon persons not within its allegiance, for conduct outside its borders that has consequences within its borders which the state reprehends * * *." *United States v. Aluminum Co. of America,* 148 F. 2d 416, 443 (2d Cir. 1945).

Travelers Health Assn. v. Virginia, 339 U. S. 643, 648; see *Hoopeston Canning Co. v. Cullen,* 318 U. S. 313, 316-317. As for the Wisconsin Consumer Act, it has not been

> "shown to be other than what on its face it appears to be a measure to safeguard the members of the public desiring to secure [goods] by [credit], who are peculiarly unable to protect themselves from fraud and overreaching of those engaged in a business notoriously subject to those abuses."[11] *California v. Thompson,* 313 U. S. 109, 112-113.

11. Aldens points out that at no time has there ever been an allegation that its credit practices are unfair, deceptive, false, misleading or unconscionable. Thus Aldens maintains that applying the Act to the company is not rationally related to the expressed purposes of the Act, especially where Wisconsin is operating near the outer boundary of its legislative power. Aldens apparently views this situation as containing an equal protection violation. (Reply Br. 1-7.)

The Wisconsin Consumer Act is "manifestly the product of an orderly and rational legislative decision." *Whalen v. Roe,* — U. S. —, —, 45 LW 4166, 4168. The fact that no allegations have been raised against Aldens of unfair credit practices does not violate equal protection. The Supreme Court has "frequently recognized that individual States have broad latitude in experimenting with possible solution to problems of vital local concern." *Id.*

Protecting Wisconsin citizens from usurious credit terms imposed when they are residents of the state certainly meets due process minimums.[12]

B. *Commerce Clause*

"[T]he Commerce Clause even without implementing legislation by Congress is a limitation upon the power of the States." *Freeman v. Hewitt,* 329 U. S. 249, 252. But the scope of the limitation has evolved through a balancing analysis. "The Commerce Clause does not, however, eclipse the reserved 'power of the States * * *.'" *Boston Stock Exchange v. State Tax Commission,* — U. S. —, —, 45 LW 4093, 4096; *California v. Thompson,* 313 U. S. 109. The mere fact that the person regulated is an interstate trader does not *ipso facto* override the independent sovereignty of the states. *Complete Auto Transit, Inc. v., Brady,* — U. S. —, 45 LW 4259; *National League of Cities v. Usery,* 426 U. S. 833; *Robertson v. California,* 328 U. S. 440, 458-459. As we noted above, that fact is only relevant to the process of balancing those interests which animate the Commerce Clause with the state's legitimate local interests. See Beaird & Ellington, A Commerce Power Seesaw: Balancing *National League of Cities,* 11 Ga. L.

11. (Cont'd.)
Since the Act is economic legislation clearly justified by Wisconsin's interest in protecting its citizens from sharp credit practices, it does not offend the equal protection clause. *McGowan v. Maryland,* 366 U. S. 420, 425-426; *Williamson v. Lee Optical Co.,* 348 U. S. 483, 488-489.

12. "It is the nature of the state's action that determines the kind or degree of activity in the state necessary for satisfying the requirements of due process." *Travelers Health Assn. v. Virginia,* 339 U. S. 643, 653 (Douglas, J., concurring). The police power requires less of a nexus than a state's power to tax or to regulate intrastate commerce. Protection of its citizens is the primary function of state government. *Freeman v. Hewitt,* 329 U. S. 249, 253.

Rev. 35 (1976). When Congress has chosen not to legislate in the field, the Commerce Clause cannot *ex proprio vigore* vitiate state sovereignty unless state regulation creates an undue burden on interstate commerce. *Complete Auto Transit, Inc. v. Brady, supra.*

Those cases which find state regulation against a purely interstate trader unconstitutional are best conceptualized as declaring that regulations of a certain character are *per se* undue rather than void *ab initio* as forbidden restraints on a purely interstate trader. Such *per se* regulations may be generically deemed as undue because of a pernicious effect on interstate trade without a correspondingly high state justification. See *International Harvester Co. v. Dept. of Treasury,* 322 U. S. 340, 353 (Rutledge, J., concurring); cf. *Northern Pacific Ry. Co. v. United States,* 356 U. S. 4, 5. The propriety of such a generic judgment was eloquently demonstrated thirty years ago by Justice Frankfurter:

> "These principles of limitation on State power apply to all State policy not matter what State interest gives rise to its legislation. A burden on interstate commerce is none the lighter and no less objectionable because it is imposed by a State under the taxing power rather than under manifestations of police power in the conventional sense. But, in the necessary accommodation between local needs and the overriding requirement of freedom for the national commerce, the incidence of a particular type of State action may throw the balance in support of the local need because interference with the national interest is remote or unsubstantial. A police regulation of local aspects of interstate commerce is a power often essential to a State in safeguarding vital local interests. At least until Congress chooses to enact a nationwide

rule, the power will not be denied to the State. State taxation falling on interstate commerce, on the other hand, can only be justified as designed to make such commerce bear a fair share of the cost of the local government whose protection it enjoys. But revenue serves as well no matter what its source. To deny to a State a particular source of income because it taxes the very process of interstate commerce does not impose a crippling limitation on a State's ability to carry on its local function. Moreover, the burden on interstate commerce involved in a direct tax upon it is inherently greater, certainly less uncertain in its consequences, than results from the usual police regulations. The power to tax is a dominant power over commerce. Because the greater or more threatening burden of a direct tax on commerce is coupled with the lesser need to a State of a particular source of revenue, attempts at such taxation have always been more carefully scrutinized and more consistently resisted than police power regulations of aspects of such commerce." *Freeman v. Hewitt,* 329 U. S. 249, 253. (Omitting citations.)

Under this analysis, it can be seen that Aldens' principal case, *viz., National Bellas Hess v. Dept. of Revenue,* 386 U. S. 753, does not aid plaintiff. Aldens' protestations that *Bellas Hess* is not a tax case are contradicted by the opinion itself. The initial construction of its constitutional argument made clear that *Bellas Hess* was being analyzed as a tax case:

> "For the test whether a *particular state exaction* is such as to invade the exclusive authority of Congress to regulate trade between the States, and the test for a State's compliance with the requirements of due

process in this area are similiar." (Emphasis supplied.) 386 U. S. at 756.

Every case cited by the Court deals not with the power to regulate but rather with the power to tax. Any doubt that *Bellas Hess* was being analyzed as a tax case, even though strictly speaking the duty imposed on Bellas Hess was to collect a tax falling on someone else, was conclusively dispelled by footnote 9. 386 U. S. at 757 n. 9. Thus as a *de facto* tax on a purely interstate trader, the legislation in *Bellas Hess* was a *per se* undue burden.

Likewise, *Allenberg Cotton Co. v. Pittman*, 419 U. S. 20, concerns state regulation which may be generically deemed as an undue burden on interstate commerce. There the Court held unconstitutional a state's refusal to honor and enforce contracts made for interstate or foreign commerce because of the enforcing corporation's failure to qualify to do business in the state.[13] Such a refusal to honor was generically repugnant to the central purposes of the Commerce Clause. Indeed, the opinion implicity declares the refusal to honor to be a heavier burden on interstate commerce than local tax incidents. 419 U. S. at 33-34.

Contrary to *Bellas Hess* and *Allenberg*, the case now before us is an exercise of the police power. As such it is inappropriate to treat it on a *per se* basis. See *Eli Lilly & Co. v. Sav-On-Drugs*, 366 U. S. 276, 284 n. 1 (Harlan, J., concurring). Rather, a balancing test is in order. *South Carolina Hwy. Dept. v. Barnwell Bros.*, 303 U. S. 177. Since the Wisconsin Consumer Act has already been shown not to be an undue burden on interstate commerce

13. Although the transaction had intrastate aspects, they were of the sort which are "in fact 'a part of interstate commerce.'" 419 U. S. at 30. Thus *Allenberg* was in all material respects purely an interstate trader.

under a balancing analysis, see part II *supra*, the Act is, therefore, constitutional.

IV

For the foregoing reasons, we find that the application of the Wisconsin Consumer Act to Aldens is constitutional and therefore affirm the judgment of the district court.

AFFIRMED.

ORDER OF THE COURT OF APPEALS ON PETITION FOR REHEARING.

United States Court of Appeals

FOR THE SEVENTH CIRCUIT
CHICAGO, ILLINOIS 60604

No. 76-1396

April 25, 1977

BEFORE

HON. WALTER J. CUMMINGS, *Circuit Judge*
HON. PHILIP W. TONE, *Circuit Judge*
HON. WILLIAM J. CAMPBELL, *Senior District Judge**

ADLENS, INC.,
Plaintiff-Appellant,

v.

BRONSON C. LaFOLLETTE, etc., et al.,
Defendants-Appellees.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF WISCONSIN.

No. 72-C-402

JAMES E. DOYLE, *Judge.*

* Senior District Judge William J. Campbell of the Northern District of Illinois is sitting by designation.

ORDER

On consideration of the petition for rehearing *en banc* filed in the above-entitled cause by plaintiff-appellant, Aldens, Inc., no judge in active service has requested a vote thereon, and all the judges on the original panel have voted to deny a rehearing *en banc*. Accordingly,

IT IS ORDERED that the aforesaid petition for rehearing be, and the same is hereby, DENIED.

IT IS FURTHER ORDERED that "and *Allenberg*" be stricken from line 7 of page 14 of the slip opinion.

STATUTES INVOLVED.

Wisconsin Consumer Act

421.201 Territorial application

(1) Except as otherwise provided in this section, this act applies to consumer transactions made in this state and to modifications including refinancings, consolidations and deferrals, made in this state, of consumer credit transactions wherever made.

(2) For the purposes of this act, a consumer transaction or modification of a consumer transaction is made in this state if:

(a) A writing signed by the customer and evidencing the obligation or an offer of the customer is received by the merchant in this state; or

(b) The merchant induces the customer who is a resident of this state to enter into the transaction by face-to-face solicitation or by mail or telephone solicitation directed to the particular customer in this state.

(3) With respect to a transaction pursuant to an open-end credit plan, this act applies if the customer is a resident of this state and the open-end creditor or a merchant honoring a credit card issued by the open-end creditor, is a resident of this state or furnishes, mails or delivers the goods, services or credit to a resident of this state while the customer is within this state or receives a writing signed by the customer and evidencing the transaction in this state.

(4) Chapter 427 applies to any debt collection activity in this state, including debt collection by means of

mail or telephone communiciations directed to customers in this state.

(5) Subchapters I and II of ch. 425, relating to creditors' remedies, including applicable penalties, apply to actions or other proceedings brought in this state to enforce rights arising from consumer transactions or extortionate extensions of credit, wherever made, but conduct, action or proceedings to recover collateral shall be governed by the law of the state where the collateral is located at the time of its recovery unless the collateral is owned by a Wisconsin resident who has removed it from this state only for purposes of transportation to or use in the resident's employment or for temporary periods which do not exceed 15 days.

(6) If a consumer transaction, or modification thereof, is made in another state with a customer who is a resident of this state when the transaction or modification is made, the following provisions apply as though the transaction occurred in this state:

(a) A creditor, or assignee of his rights, may collect through actions or other proceedings charges only to the extent permitted by ch. 422; and

(b) A merchant may not enforce rights against the customer to the extent that the provisions of the agreement violate subch. IV of ch. 422 or 423.

(7) Except as provided in sub. (4) or (5), a consumer transaction or modification thereof, made in another state with a customer who was not a resident of this state when the consumer transaction or modification was made, is valid and enforceable in this state according to its terms to the extent that it is valid and enforceable under the laws of the state applicable to the transaction.

(8) For the purposes of this act, the residence of a customer is the address given by him as his residence in any writing signed by him in connection with a consumer transaction. The given address is presumed to be unchanged until the merchant knows or has reason to know of a new or different address.

(9) Notwithstanding other provisions of this section:

(a) Except as provided in sub. (4) or (5), this act does not apply if the customer is not a resident of this state at the time of a consumer transaction and the parties then agree that the law of his residence applies; and

(b) This act applies if the customer is a resident of this state at the time of a consumer transaction and the parties then agree that the law of this state applies.

(10) Except as provided in sub. (9), the following terms of a writing executed by a customer are invalid with respect to consumer transactions, or modifications thereof, to which this act applies:

(a) That the law of another state shall apply;

(b) That the customer consents to the jurisdiction of another state; and

(c) That fixes venue.

422.201 Finance charge for consumer credit transactions

(1) With respect to a consumer credit transaction other than one pursuant to an open-end credit plan, the parties may agree to the payment by the customer of a finance charge not in excess of that permitted by subs. (2) to (4).

(2) The finance charge, calculated according to the actuarial method, may not exceed the equivalent of the total of the following:

(a) Eighteen per cent per year on that part of the unpaid balance of the amount financed which is $500 or less; and

(b) Twelve per cent per year on that part of the unpaid balance of the amount financed which is more than $500.

(3) For licensees under s. 138.09 and under s. 218.01, the finance charge, calculated according to those sections, may not exceed the maximums permitted in ss. 138.09 and 218.01, respectively.

(4) For sellers of farm equipment, farm implements and farm tractors, other than licensees under s. 218.01, the finance charge on the sale of equipment may not exceed the Class 2 rate for motor vehicles, as specified in s. 218.01 (6), and calculated in accordance with that section.

(5) For the purposes of this section:

(a) The finance charge may be calculated on the assmption that all scheduled payments will be made when due;

(b) The dollar amount of finance charge shall include the prepaid finance charge excluded from the amount financed; and

(c) The effect of prepayment is governed by the provisions on rebate upon prepayment under s. 422.209.

(6) For the purposes of this section, the term of a consumer credit transaction other than one pursuant to an open-end credit plan commences with the date the credit

is granted or, if goods are delivered, services performed or proceeds of a loan paid 10 days or more after that date, with the date of commencement of delivery or performance. Differences in lengths of months are disregarded and a day may be counted as one-thirtieth of a month.

(7) Subject to classifications and differentiations the merchant may reasonably establish, he may make the same finance charge on all amounts financed within a specified range. A finance charge so made does not violate sub. (2), (3) or (4) as the case may be if:

(a) When applied to the median amount within each range, it does not exceed the maximum permitted by sub. (2), (3) or (4) as the case may be; and

(b) When applied to the lowest amount within each range, it does not produce a rate of finance charge exceeding the rate calculated according to par. (a) by more than 8% of the rate calculated according to par. (a).

(8) Notwithstanding sub. (2), (3 or (4), a merchant may contact for and receive a minimum finance charge with respect to a transaction other than one pursuant to an open-end credit plan, of not more than $5 when the amount financed does not exceed $75, or $7.50 when the amount financed exceeds $75.

(9) With respect to consumer credit transactions pursuant to an open-end credit plan the parties may agree to the payment by the customer of a finance charge not in excess of those permitted by sub. (2) or (3), whichever is applicable.

(a) A finance charge shall be deemed not to exceed such rates, if it is determined by applying a periodic rate not in excess of those specified in par. (b) or (c) to:

1. The average daily balance of the account;

2. The unpaid balance of the account on the last day of the billing cycle calculated after first deducting all payments, credits and refunds during the billing cycle; or

3. The median amount within a specified range within which the unpaid balance as calculated according to subd. 1 or 2 is included. A charge may be made pursuant to this paragraph only if the creditor, subject to classifications and differentiations he may reasonably establish, makes the same charge on all balances within the specified range and if the percentage when applied to the median amount within the range does not exceed the charge resulting from applying that percentage to the lowest amount within the range by more than 8% of the charge on the median amount.

(b) If the billing cycle is monthly, the maximum periodic rate is 1.5% of that part of the amount specified in par. (a) which is $500 or less, and one per cent of that part of such amount which is more than $500; except that for licensees under s. 138.09 the maximum periodic rate shall not exceed a periodic rate equivalent to the rate permitted under s. 138.09, as determined by the administrator.

(c) If the billing cycle is not monthly, the maximum periodic rates are those percentages which bear the same relation to the percentages specified in par.

(b) as the number of days in the billing cycle bears to 30.

(d) Irrespective of variations from cycle to cycle, a billing cycle is "monthly" for purposes of this section if the average length of 12 successive cycles is not less than 30 or more than 32 days.

(10) Anything to the contrary in this chapter notwithstanding, with respect to consumer credit sales and consumer loans secured by real property and insured or guaranteed by the federal government, or any agency or instrumentality thereof, this chapter shall not prohibit or limit any charges which are required by statutes, rules or regulations of such government, agency or instrumentality.

(11) A violation of this section is subject to s. 425.305.

425.305 Transactions which are void

(1) In a transaction to which this section applies, the customer shall be entitled to retain the goods, services or money received pursuant to the transaction without obligation to pay any amount.

(2) In addition, the customer shall be entitled to recover any sums paid to the merchant pursuant to the transaction.

425.306 Unenforceable obligations

(1) Any charge, practice, term, clause, provision, security interest or other action or conduct in violation of this act, to the extent that the same is in violation of this act, shall confer no rights or obligations enforceable by action.

(2) This section shall not affect the enforcement of any provision that is not prohibited by this act.

425.401 Wilful violations: misdemeanor

A person who wilfully and knowingly engages in any conduct or practice in violation of this act may be fined not more than $2,000.

426.301 Violations and enforcement

(1) The administrator may recover in a civil action from a person who violates this act or any rule made pursuant to any authority granted in this act, a civil penalty of not less than $100 and not more than $1,000 for each violation.

(2) In addition to the amount to which he shall be entitled under sub. (1), the administrator may recover in a civil action from a person who knowingly or wilfully violates this act or any rule made pursuant to any authority granted in this act, a civil penalty of not less than $1,000 and not more than $10,000 for each violation.

Supreme Court, U. S.
FILED
AUG 29 1977
MICHAEL RODAK, JR., CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1977

No. 77-136

ALDENS, INC.,
Petitioner,

v.

BRONSON C. LA FOLLETTE, Individually and as Attorney General for the State of Wisconsin, and ERICH MILDENBERG, Individually, and as Commissioner of Banking for the State of Wisconsin,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

BRIEF IN OPPOSITION

BRONSON C. LA FOLLETTE
Attorney General of Wisconsin

JAMES D. JEFFRIES
Assistant Attorney General of Wisconsin

Attorneys for Respondents

Post Office Address:
114 East, State Capitol
Madison, Wisconsin 53702

INDEX

Page

OPINIONS BELOW 1

QUESTION PRESENTED 1

STATEMENT OF THE CASE 2

A. Nature of the Case 2

B. Statement of Facts 2

THERE IS NO REASON TO GRANT THE WRIT 4

ARGUMENT 5

I. The Court Of Appeals Properly Held That The Due Process And Commerce Clauses Do Not Prevent Wisconsin From Regulating The Mail Order Credit Charges And Practices Of Aldens Directed Towards Its Wisconsin Customers 5

A. The cases uniformly hold that the states may regulate the mail order solicitation and selling activities of foreign corporations to protect their residents against deceptive and overreaching practices 5

B. The cases uniformly hold that such regulations do not impose an undue burden on interstate commerce 9

Page

II. The Cases Cited By Aldens Are Not Relevant To The Constitutionality Of State Consumer Credit Regulatory Statutes 12

CONCLUSION 18

TABLE OF CITATIONS

Cases

Aldens, Inc. v. La Follette,
552 F. 2d 745 (7th Cir. 1977) 1, 5, 10, 13

Aldens, Inc. v. Packel,
379 F. Supp. 521 (M.D. Pa. 1974);
524 F. 2d 38 (3rd Cir. 1975), *cert. denied*
425 U.S. 943 (1976) 5, 6, 10, 11, 12, 14

Aldens, Inc. v. Ryan,
No. CIV-75-0458-0 (W.D. Okla.,
June 14, 1976) (appeal pending) 6, 10, 11

Allenberg Cotton Co. v. Pittman,
419 U.S. 20 (1974) 12, 13, 15, 16, 17

Carey v. Population Services International,
___ U.S. ___, 97 S. Ct. 2010 (June 9, 1977) 16

Complete Auto Transit, Inc. v. Brady,
___ U.S. ___, 97 S. Ct. 1076 (March 7, 1977) 9-10

Eli Lilly & Co. v. Sav-On-Drugs, Inc.,
366 U.S. 276 (1961) 13, 17

Page

Florida Lime & Avocado Growers, Inc. v. Paul,
373 U.S. 132 (1963) 9

Freeman v. Hewitt,
329 U.S. 249 (1946) 13

Great Atlantic & Pacific Tea Co., Inc. v. Cottrell,
424 U.S. 366 (1976) 9

Head v. New Mexico,
374 U.S. 424 (1963) 9

Hoopeston Canning Co. v. Cullen,
318 U.S. 313 (1943) 6, 7

Huron Portland Cement Co. v. City of Detroit,
362 U.S. 440 (1960) 9, 13

International Shoe Co. v. State of Washington,
326 U.S. 310 (1945) 6

McGee v. International Life Insurance Co.,
355 U.S. 220 (1957) 6

Miller v. California,
413 U.S. 15 (1973) 11

Minister's Life & Casualty Union v. Haase,
30 Wis. 2d 339, 141 N.W. 2d 287 (1966),
appeal dismissed 385 U.S. 205 (1966) 7

Missouri v. K. & T. R. Co. v. Haber,
169 U.S. 613 (1898) 16

National Bellas Hess v. Department of Revenue,
386 U.S. 753 (1967) 12-13, 14, 15

Page

National Geographic Society v. California Board of Equalization, ____ U.S. ____, 97 S. Ct. 1386 (April 4, 1977) 12, 13, 14, 15

Oxford Consumer Discount Co. v. Stefanelli, 102 N.J. Super. 549, 246 A. 2d 460 (1968), *appeal dismissed* 400 U.S. 308 (1970) 11

People v. Fairfax Family Fund, Inc., 47 Cal. Rptr. 812, 235 Cal. App. 2d 881 (1965), *appeal dismissed* 382 U.S. 1 (1965) 7, 11, 16

Pike v. Bruce Church Ins., 397 U.S. 137 (1970) 9

Rasmussen v. Idaho, 181 U.S. 198 (1901) 16

Robertson v. California, 328 U.S. 440 (1945) 9, 11, 12, 16

Roth v. United States, 354 U.S. 476 (1957) 11

Sligh v. Kirkwood, 237 U.S. 52 (1914) 9

South Carolina State Highway Dept. v. Barnwell Bros., 303 U.S. 177 (1938) 9

State of Washington v. Reader's Digest Ass'n., Inc., 81 Wash. 2d 259, 501 P. 2d 290 (1972), *appeal dismissed* 411 U.S. 945 (1973) 7

Page

Strassheim v. Daily, 221 U.S. 280 (1911) 8

Travelers Health Ass'n. v. Virginia, 339 U.S. 643 (1950) 6, 7

United National Life Insurance Co., et al. v. California, 58 Cal. Rptr. 599, 427 P. 2d 199 (1967), *appeal dismissed* 389 U.S. 330 (1967) 7

Statutes

Pennsylvania Goods & Services Installment Sales Act, 69 Pa. Stats. 1101, et seq. 10

15 U.S.C. 1601-1681 11-12

15 U.S.C. 1610, 1633, 1677, 1681 12

15 U.S.C. 1610(b) 15

OTHER AUTHORITIES CITED

Commerce Clause of Art. I, Sec. 8 ..... 2, 9, 10, 12, 16, 17

Supremacy Clause of Art. VI 2

U.S. Constitutional Amendments

First 2

Fourteenth 2

Supreme Court Rules Rule 19, sub 1(b) 4

IN THE

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October Term, 1977

No. 77-136

ALDENS, INC.,
Petitioner,

v.

BRONSON C. LA FOLLETTE, Individually and as Attorney General for the State of Wisconsin, and ERICH MILDENBERG, Individually, and as Commissioner of Banking for the State of Wisconsin,
Respondents.

BRIEF IN OPPOSITION

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Seventh Circuit is reported at 552 F. 2d 745; the opinion of the United States District Court for the Western District of Wisconsin is not officially reported but is set forth at A1-A15 in Aldens' Petition for a Writ of Certiorari in this case.

QUESTION PRESENTED

Does the State of Wisconsin's regulation of the conduct of a foreign corporation in its mail order credit transactions with Wisconsin residents offend due process or constitute an undue burden on interstate commerce?

STATEMENT OF THE CASE

A. Nature of the Case

Aldens commenced this action on October 31, 1972, against the Attorney General and Commissioner of Banking of the State of Wisconsin. The complaint seeks a declaratory judgment that the application of Wisconsin law to Aldens' transactions with Wisconsin residents violates the Commerce Clause and Postal Clause of Art. I, Sec. 8, the Supremacy Clause of Art. VI and the First and Fourteenth Amendments of the United States Constitution.

The subject of this action is the mail order revolving charge account plan of Aldens. Aldens contends that the application of Wisconsin law to its revolving charge account plan is an unconstitutional attempt to regulate a business that is "purely interstate" in nature. It is the position of the State of Wisconsin, on the other hand, that Aldens may validly be subjected to Wisconsin's consumer credit laws to the extent that it engages in business with Wisconsin residents located within the State of Wisconsin. The District Court for the Western District of Wisconsin, Honorable James E. Doyle presiding, held that the State of Wisconsin may constitutionally regulate the revolving charge account transactions between Aldens and its Wisconsin mail order customers. The Seventh Circuit Court of Appeals affirmed the decision of the District Court.

B. Statement of Facts

The following facts are drawn from the Stipulation of Facts in this case (set forth in the District Court's opinion, A2-A7) and supplement the statement of facts recited by Aldens on pages 7-9 of its petition.

Aldens, Inc., is an Illinois corporation which conducts a general retail merchandise mail order business from Chicago, Illinois, to customers residing in all fifty states. Among these customers are approximately 23,000 Wisconsin residents to whom sales of approximately $4,600,000.00 are made each year. Approximately 73 percent of these Wisconsin sales are on credit with an average account balance of $164.81 (A3, par. 9).

Although Aldens has no offices or agents in Wisconsin, it regularly solicits business with Wisconsin residents through the mailing of catalogs and other printed materials to persons residing within Wisconsin. Specifically, Aldens mails catalogs to Wisconsin residents about four times each year and, in addition, mails supplemental advertising flyers six to eight times each year. Aldens also includes advertising material with the customer's monthly billing statement. The catalogs and "flyers" are mailed to Aldens' active Wisconsin customer list of about 65,000 names and inactive customer list of about 9,000 names. In addition, Aldens rents mailing lists from mailing list brokers located outside of Wisconsin and makes additional mailings to Wisconsin residents (A5, par. 18).

Among the printed materials mailed by Aldens to persons within the State of Wisconsin are credit application forms and credit sales agreement forms. The credit application and agreement form is completed and signed within Wisconsin by the Wisconsin resident and is then mailed from Wisconsin to Aldens at its offices in Chicago (A6, par. 20). Aldens then determines the credit worthiness of the Wisconsin customer through a procedure that sometimes includes phoning credit bureaus in Wisconsin for in-file checks of their records (A6, par. 19).

The credit agreement sets forth the terms under which the Wisconsin customer may obtain an extension of credit

on purchases from Aldens. Following the purchase of merchandise under the credit plan, Aldens sends monthly billing statements to its credit customers in Wisconsin. These statements set forth the charges to each Wisconsin customer's account and require payment by a certain date to avoid the assessment of finance charges (A6, par. 22). The monthly payment for merchandise purchased and finance charges assessed under the credit plan is then mailed in Wisconsin to Aldens in Chicago (A7, par. 23).

In the event a customer becomes delinquent in the payment of his account, Aldens attempts to collect the account using letters and other communications mailed from Chicago addressed to the customer in Wisconsin. In some instances, Aldens telephones the Wisconsin customer from Chicago to discuss his account and request payment (A7, par. 24). After an account has been delinquent for more than six months, Aldens writes it off as a bad debt. Some of these written off accounts are turned over by Aldens to Illinois or Minnesota independent collection agencies for collection (A7, par. 26).

THERE IS NO REASON TO GRANT THE WRIT

Although this Court has jurisdiction to grant a writ of certiorari to review the decision of the Seventh Circuit Court of Appeals, there is no reason to do so. This case does not meet the criteria set forth in sub. 1(b) of Rule 19, Supreme Court Rules, as considerations governing review of a court of appeals decision on certiorari. The decision of the court below is in accord with the decision of another court of appeals on the same matter and is fully consistent with all applicable decisions of this Court.

ARGUMENT

I. The Court Of Appeals Properly Held That The Due Process And Commerce Clauses Do Not Prevent Wisconsin From Regulating The Mail Order Credit Charges And Practices Of Aldens Directed Towards Its Wisconsin Customers.

A. The cases uniformly hold that the states may regulate the mail order solicitation and selling activities of foreign corporations to protect their residents against deceptive and overreaching practices.

In evaluating Aldens' due process challenge, the District Court held that Wisconsin can act to protect the public welfare from the "concerted, systematic exploitation of the Wisconsin market" (A10) "on the scale of Aldens, even though those activities involve no physical presence" (A12-13) within Wisconsin. In affirming the District Court's opinion, the Court of Appeals held that although "the connection between a state and the regulated person must be of a more substantial character than the 'minimum contacts' needed to support judicial process" (552 F. 2d at 751, A25), "[p]rotecting Wisconsin citizens from usurious credit terms imposed when they are residents of the state certainly meets due process minimums." (552 F. 2d at 751, A27).

In so holding, both courts expressly adopted the opinion of the Third Circuit Court of Appeals which dealt with the identical issues raised by the identical mail order seller in the identical factual setting. *Aldens, Inc. v. Packel*, 524 F. 2d 38 (3rd Cir. 1975). The Court of Appeals, in affirming the decision of the District Court for the Middle District of Pennsylvania (reported at 379 F. Supp. 521), held that:

> "Pennsylvania's interest in the rates which its residents pay for the use of money for the purchase of goods delivered into Pennsylvania is substantial enough to satisfy any due process objection to its attempt at regulating the subject matter." 524 F. 2d at 43.

Aldens' petition for a writ of certiorari in the *Packel* case was subsequently denied by this Court. 425 U.S. 943 (1976).[1]

As the courts below and the Third Circuit Court of Appeals correctly recognized, the "presence concept" of doing business has clearly been displaced by the more realistic approach of examining the extent of contacts with, and the degree of interest of, the regulating state. *See McGee v. International Life Insurance Co.*, 355 U.S. 220 (1957); *Travelers Health Ass'n. v. Virginia*, 339 U.S. 643 (1950); *International Shoe Co. v. State of Washington*, 326 U.S. 310 (1945); and *Hoopeston Canning Co. v. Cullen*, 318 U.S. 313 (1943). For example, in *Travelers Health Ass'n. v. Virginia, supra*, this Court held that the State of Virginia could subject a mail order insurance company to its laws, even though Travelers had no agents in Virginia and solicitation of new members was largely accomplished through the mails. The Court "rejected the contention . . . that a state's *power to regulate* must be determined by a 'conceptualistic discussion of theories of place of contracting or of performance'" and instead "accorded

[1] In addition, Aldens' position has been rejected by the District Court for the Western District of Oklahoma. *Aldens, Inc. v. Ryan*, No. CIV-75-0458-O (W.D. Okla., June 14, 1976). Aldens has appealed the District Court's judgment to the Tenth Circuit Court of Appeals.

'great weight' to the 'consequences' of the contractual obligations" in the regulating state and the "'degree of interest' that state had in seeing that those obligations were faithfully carried out." *Travelers Health Ass'n. v. Virginia, supra*, 339 U.S. at 648 (emphasis added), quoting *Hoopeston Canning Co. v. Cullen, supra*, at 316.

Following the above rulings of this Court, other courts have applied the same interest analysis approach in sustaining the constitutionality of state regulations involving out-of-state mail order operations. *See*, for example, *People v. Fairfax Family Fund, Inc.*, 47 Cal. Rptr. 812, 235 Cal. App. 2d 881 (1965), *appeal dismissed* (for want of a substantial federal question) 382 U.S. 1 (1965), which upheld California's regulation of mail order loan transactions between a Kentucky based firm and residents of California; *Minister's Life & Casualty Union v. Haase*, 30 Wis. 2d 339, 141 N.W. 2d 287 (1966), *appeal dismissed* (for want of a substantial federal question) 385 U.S. 205 (1966), and *United National Life Insurance Co., et al. v. California*, 58 Cal. Rptr. 599, 427 P. 2d 199 (1967), *appeal dismissed* (for want of a substantial federal question) 389 U.S. 330 (1967), which upheld Wisconsin and California regulations of mail order insurance transactions between foreign corporations and residents of those states; and *State of Washington v. Reader's Digest Ass'n, Inc.*, 81 Wash. 2d 259, 501 P. 2d 290 (1972), *appeal dismissed* (for want of a substantial federal question) 411 U.S. 945 (1973), which upheld the application of the State of Washington's Consumer Protection Act to the mail solicitations of Reader's Digest. Each of these cases is clearly grounded on the interest of the state in protecting its citizens from the substantial mail order solicitation and selling activities of the foreign corporation and not upon any *de minimus* physical presence in the state.

In light of the above cases, it is clear that Aldens' reliance upon antiquated concepts of extraterritoriality is misplaced and out of line with the recent trend towards expanding state regulatory jurisdiction over commercial

activities which emanate from outside a state but affect persons or property within the state. Indeed, even pre-*International Shoe* cases support respondents' position that a state can, consistently with due process, regulate a non-resident corporation in its transactions with residents of the state. As early as 1911, Justice Holmes, speaking for the Court in *Strassheim v. Daily*, 221 U.S. 280, 285, stated:

> "Acts done outside a jurisdiction, but intended to produce and producing detrimental effects within it, justify a state in punishing the cause of the harm as if he had been present at the effect, if the state should succeed in getting him within its power."

In conclusion, respondents submit that Aldens' view of due process is predicated on older, more simplistic concepts that a state's power necessarily ends at its territorial boundaries. As the foregoing line of cases makes clear, however, regulatory jurisdiction is no longer limited to "physical presence" or territorial boundaries. In the instant case, Wisconsin, in the exercise of its police powers, has a clear interest in protecting its citizens from abuses by foreign corporations in consumer credit sales. Under these circumstances, and especially in light of the multi-million dollar volume of business conducted by Aldens with Wisconsin residents each year, the decision of the Court of Appeals was both proper and consistent with prior due process decisions relating to the power of the states to regulate the conduct of foreign corporations in their mail order transactions with forum residents.

B. The cases uniformly hold that such regulations do not impose an undue burden on interstate commerce.

Aldens contends that the Commerce Clause of the United States Constitution (Article I, Section 8) prevents Wisconsin from regulating its mail order credit activities affecting customers within Wisconsin. It argues that it is an "interstate trader" engaged in "pure" interstate commerce and, therefore, cannot be regulated by the states.

Aldens' *per se* position ignores the long-standing rule that state regulations involving a legitimate local interest are not invalid because they affect interstate commerce unless the burden on such commerce is clearly excessive in relation to the local benefits. The *Great Atlantic & Pacific Tea Company, Inc. v. Cottrell*, 424 U.S. 366 (1976); *Pike v. Bruce Church Ins.*, 397 U.S. 137 (1970); *Head v. New Mexico*, 374 U.S. 424 (1963); *Florida Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132 (1963); *Huron Portland Cement Co. v. City of Detroit*, 362 U.S. 440 (1960); *Robertson v. California*, 328 U.S. 440 (1945); *South Carolina State Highway Dept. v. Barnwell Bros.*, 303 U.S. 177 (1938); *Sligh v. Kirkwood*, 237 U.S. 52 (1914). Thus, the question is not simply whether or not the foreign corporation is an "interstate trader," but rather whether the state regulation is an undue or unreasonable burden on interstate commerce.[/2]

[/2] The *per se* approach to interstate commerce questions was most recently rejected in the case of *Complete Auto Transit, Inc. v. Brady*, ____ U.S. ____, 97 S. Ct. 1076 (March 7, 1977). Although recognizing that a rule of "absolute immunity for interstate commerce . . . would relieve this Court of difficult judgments," the Court added

(footnote 2 continued on next page)

In *Aldens, Inc. v. Packel, supra*, four factors were examined by the Third Circuit Court of Appeals to determine whether the application of the State of Pennsylvania's credit laws to Aldens was prohibited by the Commerce Clause. These four factors were: (1) has Congressional action pre-empted the field; (2) does the state regulation require a uniform national policy; (3) does the state regulation discriminate against persons engaged in interstate commerce; and (4) does the application of state law impose a burden in excess of any value attached to the state's interest in imposing its regulation. The court found that none of these four factors were present in that case and held that the Pennsylvania Goods and Services Installment Sales Act[3] does not constitute an undue burden on interstate commerce as applied to Aldens' mail order credit sales to Pennsylvania residents. *Aldens, Inc. v. Packel, supra*, 524 F. 2d at 45-46. The District Court and Court of Appeals decisions in this case (A14; 552 F. 2d at 749, A22) and the District Court opinion in *Aldens, Inc. v. Ryan, supra*, expressly adopted the Third Circuit's analytical approach to the Commerce Clause balancing issues and likewise held that there existed no undue burden on interstate commerce in applying the Wisconsin and Oklahoma consumer credit laws to Aldens' mail order credit sales with residents of those states.

(footnote 2 continued)

that ". . . administrative convenience . . . is insufficient justification for abandoning the principle that 'interstate commerce may be made to pay its way.'" 97 S. Ct. at 1084.

[3] 69 Pa. Stats. 1101, et seq.

In addition to the recent *Packel* and *Ryan* decisions, the balancing test has been applied in upholding the constitutionality of other state credit laws that regulated foreign corporations which conducted their business in the forum state solely by mail. *See Oxford Consumer Discount Company v. Stefanelli*, 102 N.J. Super. 549, 246 A. 2d 460 (1968), *appeal dismissed* 400 U.S. 308 (1970); *People v. Fairfax Family Fund*, 47 Cal. Rptr. 812, 235 Cal. App. 2d 881 (1965), *appeal dismissed* 382 U.S. 1 (1965).

Aldens' interstate commerce position would effectively render the states unable to regulate any activity of an "interstate trader," however harmful the effect on their citizens.[4] The "result would be ultimately to force all of the states to accept the lowest standard for conducting the business permitted by one of them" and would "[i]nevitably . . . mean that Congress would be forced to intervene and displace the states . . .." *Robertson v. California, supra*, 328 U.S. at 460.[5] The resulting federal administra-

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[4] Throughout Aldens' argument about "pure" commerce, it attempts to convey the impression that there is something constitutionally sacred about mail order activities that makes them exempt from state regulation. That this is not the case is abundantly clear from a long line of federal cases. In addition to those previously cited herein, *see Miller v. California*, 413 U.S. 15 (1973), and *Roth v. United States*, 354 U.S. 476 (1957).

[5] To date, federal action in the consumer credit area has been largely limited to the Consumer Credit Protection Act, 15 U.S.C. 1601-1681, commonly known as the "Truth in Lending" Act. That act does not evidence any Congressional intent to exclude concurrent regulation by the

(footnote 5 continued on next page)

tive burdens would be staggering and, even with increased resources, the federal government would probably encounter great difficulty in carrying out the details and continuous policing necessary for effective regulation. Fortunately, as the Court stated in *Robertson*, *supra*, the Commerce Clause does not dictate such a result. To the contrary, as was noted in *Packel*:

> "The burden on interstate commerce does not depend upon the happenstance of the respective locations of buyer and seller." 524 F. 2d at 47.

In short, the Court of Appeals' conclusion that the application of the Wisconsin Consumer Act to Aldens' credit transactions with Wisconsin residents is not prohibited by the Commerce Clause is fully consistent with the prior holdings of this Court and other applicable judicial decisions and, therefore, need not be reviewed.

II. The Cases Cited By Aldens Are Not Relevant To The Constitutionality Of State Consumer Credit Regulatory Statutes.

Aldens relies upon four decisions of this Court, *National Geographic Society v. California Board of Equalization*, ___ U.S. ___, 97 S. Ct. 1386 (April 4, 1977), *Allenberg Cotton Co. v. Pittman*, 418 U.S. 20 (1974), *National Bellas*

(footnote 5 continued)

states. In fact, to the contrary, in four specific sections (15 U.S.C. 1610, 1633, 1677 and 1681) Congress explicitly waives preemptive intent and in unequivocal language recognizes that state laws, unless inconsistent with the Act, remain unimpaired.

Hess v. Department of Revenue, 386 U.S. 753 (1967), and *Eli Lilly & Co. v. Sav-On-Drugs, Inc.*, 366 U.S. 276 (1961), in support of its contention that it is exempt from state regulation absent an identifiable physical presence in the regulating state. These decisions fall into two categories: the tax cases (*National Bellas Hess* and *National Geographic*) and the cases relating to the denial of state court access to foreign corporations operating in interstate commerce (*Allenberg* and *Eli Lilly*).

National Bellas Hess dealt with the constitutionality of a State of Illinois requirement that imposed use tax collection responsibility upon an out-of-state mail order retailer with no offices or agents in Illinois. As the Court of Appeals pointed out, the case was clearly treated by this Court as a tax case and was decided entirely on the basis of case authorities in the area of the power of the state to tax out-of-state retailers (552 F. 2d at 752-53, A29-30).

Since *National Bellas Hess* is a tax case, it is inapplicable to a state statute enacted to protect the health, safety and welfare of its citizens. As the District Court below noted, "[t]axation and the collection of taxation have long been regarded as obligations which may be imposed only on those who enjoy the benefits of living or operating a business within the taxing unit." (A12). The District Court therefore concluded that "[t]he level of state activity which would justify taxation is of a far greater magnitude than the level of activity which justifies the application of state statutes seeking to protect the public health or welfare." (A12). *See Huron Portland Cement Co. v. City of Detroit*, 362 U.S. 440 (1960). The Court of Appeals, in affirming the District Court's decision, quoted from *Freemen v. Hewitt*, 329 U.S. 249, 253 (1946), where this Court discussed at length the greater burden on interstate commerce presented by tax cases as opposed to police regulations designed to safeguard local interests (552 F. 2d at 752,

A28-29). The Court of Appeals therefore also concluded that *National Bellas Hess* was inapplicable to the exercise of police power presented by the Wisconsin Consumer Act.

Similarly, the Third Circuit in *Aldens, Inc. v. Packel, supra*, 524 F. 2d at 43, stated:

> "Tax cases of necessity come in for special due process scrutiny. No state interest rates so high in the state scale of values as the states sovereign's fisc. At the same time no extraterritorial manifestation of sovereignty, except possibly arrest, is quite so offensive to common notions of its territorial limits. Thus extraterritorial impositions of tax collection obligations have been upheld only when it can be said that a benefit has been conferred on the tax collector by virtue of the state's sovereignty, and tax is related to that benefit."

The scope of the ruling in *National Bellas Hess* was recently narrowed by the decision in *National Geographic Society v. California Board of Equalization, supra. National Geographic* held that the State of California could impose use tax collection liability on an out-of-state mail order seller on the basis that two unrelated California advertising offices of the seller provided a sufficient nexus with the taxing state. As in *National Bellas Hess*, the cases cited in *National Geographic* dealt not with regulation but with the power to tax.

In enthusiastically citing *National Geographic*, Aldens merely adds green wood to an already smoldering fire. *National Geographic* simply refines the ruling in *National Bellas Hess* by specifying the minimum nexus that must be established between an out-of-state seller and a *taxing*

state in order to justify the imposition of use tax collection liability. Neither *National Geographic* nor *National Bellas Hess* stand for the proposition that a state may not act to protect its citizens by regulating the credit charges and practices of out-of-state mail order sellers.

The principal case which Aldens relies upon as defining the plane of impermissible regulation of "pure" interstate commerce is *Allenberg Cotton Co. v. Pittman, supra. Allenberg* involved the application of a Mississippi statute which prohibited the use of the Mississippi state courts to foreign corporations that failed to qualify to transact business in the state. This Court held that the statute constituted an undue burden on interstate commerce as applied to a Tennessee cotton merchant who attempted to use the Mississippi courts to enforce a contract to purchase cotton from a Mississippi farmer.

The facts in *Allenberg* are in sharp contrast to those in this case. *Allenberg* involves a burden on the cotton marketing system, an area of great import to our national economy; this case involves the setting of maximum finance charges in consumer credit transactions, an area in which Congress has expressly deferred to the states. *See* 15 U.S.C. 1610(b). In *Allenberg* there is no assertion of an overriding state public purpose as balanced against the substantial federal interest in the uninterrupted operation of the interstate cotton exchange; here there is the strong Wisconsin interest in protecting its residents from the imposition of unconscionably high finance charges as balanced against little or no federal interest. Finally, *Allenberg* involves a statute prohibiting the use of state courts to certain foreign corporations engaged in interstate commerce; here there is no statute or other state effort which denies Aldens access to Wisconsin courts to enforce its contracts with Wisconsin residents.

Because of the numerous distinctions between *Allenberg* and this case, Aldens is forced to interpret the Court's decision as a rejection of the "balancing test" in Commerce Clause cases in favor of a *"per se"* rule. However, as both lower courts in this case noted, implicit in the opinion in *Allenberg* is the process of balancing the federal interest in minimal disruptions of the free flow of commerce in the interstate cotton market with the purported interests of the State of Mississippi in denying access to its courts to foreign corporations which have not qualified to do business in Mississippi. In *Allenberg* the Court balanced the conflicting interests and struck down the state law. That is not to say, however, that all state laws are unconstitutional when applied to an "interstate trader." As this Court said in *Robertson v. California, supra*, 328 U.S. at 458, "it is not simply the fact of prohibition, but what is forbidden and for the protection of what interest, that is determinative."[6] In *Allenberg* one finds a weak state interest in requiring a certificate of authority to do business for foreign corporations and a corresponding heavy burden on interstate commerce through the denial

[6] For example, the state interest in protecting its citizens has been found to be so strong in some cases that states have even been permitted to prohibit entirely the entry of certain dangerous products. *Robertson v. California, supra; Rasmussen v. Idaho*, 181 U.S. 198 (1901); *Missouri v. K. & T. R. Co. v. Haber*, 169 U.S. 613 (1898). Similarly, in the recent right to privacy decision involving the constitutionality of a New York contraceptive law as applied to a North Carolina mail order firm, this Court recognized that "even a burdensome regulation may be validated by a sufficiently compelling state interest." *Carey v. Population Services International*, ____ U.S. ____, 97 S. Ct. 2010, 2017 (June 9, 1977).

of court access for the enforceability of interstate contracts. Thus, the decision is fully compatible with other Commerce Clause decisions of this Court which have applied the balancing test.

Aldens also cites *Eli Lilly & Co. v. Sav-On-Drugs, Inc.*, 366 U.S. 276 (1961), as another decision of this Court which clearly establishes that a regulating state must first find an intrastate activity upon which to base its regulation. *Eli Lilly* involved a New Jersey statute which denied foreign corporations transacting business in New Jersey the right to bring any action in the state upon any contract made there unless the corporation registered with the Secretary of State and obtained a certificate authorizing it to do business in the state. Thus, *Eli Lilly* falls in the line of cases, leading to *Allenberg*, which have struck down state laws denying foreign corporations access to forum courts. Here, of course, there is no comparable statute. It should also be noted that the Supreme Court in *Eli Lilly* actually sustained the constitutionality of the New Jersey statute in that case so that Aldens' reliance upon it is based solely upon conjecture that the Court would rule otherwise if confronted with the facts of this case.

In conclusion, it is abundantly clear that none of the cases relied upon by Aldens stands for the proposition that an interstate trader is immune from state regulation. To the contrary, what emerges from an evaluation of the due process and interstate commerce cases over the past 30 years is not the wooden, *per se*, test urged upon this Court by Aldens, but rather a multi-faceted analytical approach which examines the nature and extent of the activity which the state has sought to regulate, the state and federal interest in the area and the manner in which the state has attempted to assert its regulatory interest. Such an analysis was made by the Court of Appeals in this case and properly led to the sustaining of the constitutionality of the Wisconsin Consumer Act as applied to Aldens.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the Petitioner has presented no issues worthy of discretionary review by this Court and that, therefore, its Petition should be denied.

Respectfully submitted,

BRONSON C. LA FOLLETTE
Attorney General of Wisconsin

JAMES D. JEFFRIES
Assistant Attorney General of Wisconsin

Attorneys for Respondents

Post Office Address:

114 East, State Capitol
Madison, Wisconsin 53702

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IN THE

Supreme Court of the United States

For the October, 1977 Term

No. 77-1[illegible]

ALDENS, INC.,

Petitioner,

v.

BRONSON C. LaFOLLETTE, Individually and as Attorney General for the State of Wisconsin, and ERICH MILDENBERG, Individually, and as Commissioner of Banking for the State of Wisconsin,

Respondents.

MOTION OF DIRECT MAIL/MARKETING ASSOCIATION, INC. TO FILE A BRIEF AS AN *AMICUS CURIAE* IN SUPPORT OF THE PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

GILBERT H. WEIL,
Attorney for Direct Mail/
Marketing Association, Inc.

ROBERT L. SHERMAN
WEIL, GUTTMAN & DAVIS
60 East 42nd Street
New York, New York 10017
(212) 687-8573
Of Counsel

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Direct Mail/Marketing Association, Inc. (DMMA), a New York Not-For-Profit Corporation, is the largest and oldest national trade association serving the vast community involved in direct-to-the-consumer mail advertising and marketing. It hereby moves for leave to file the within brief as an *amicus curiae* since consent to do so has been refused by Bronson C. LaFollette, Esq. and Mr. Erich Mildenberg, respondents herein, although it has been granted by Aldens, Inc. *Amicus* urges the Court to grant Aldens' petition for a writ of certiorari.

Question Presented

May Wisconsin, without violating the due process clause of the fourteenth amendment and the commerce clause of the constitution, impose its own requirements upon a seller whose only connection with that state is through interstate channels of communication and transportation?

Interest of *Amicus Curiae*

Direct mail advertising ranks third as a selling medium, behind newspapers and television. An estimated $5 billion was invested in direct mail in 1976, producing sales of goods and services in excess of $60 billion. Thus, direct mail accounts for an estimated 12 percent of all consumer purchases. Taking into account the various phases of direct mail marketing—creating, printing, distributing and processing advertising, and fulfilling orders generated thereby —one finds that more than one million people depend on direct mail marketing for employment.

DMMA's membership totals more than 1,700 firms, located in 50 states and 30 foreign countries. Members range in size from "Fortune 500" giants to sole practitioners, and represent every functional level of industry—manufacturing, wholesale and retail. As direct mail advertising and marketing techniques are used by each of them as an integral part of conducting their respective businesses, a judicial decision that affects those techniques must and will have a significant and direct impact on DMMA's membership.

Members of DMMA who use direct mail and other direct techniques to market their products or services do so primarily in interstate commerce, most of such activities being on a national basis. Efficiency in doing so, hence ability to

compete with retail outlets, including national or major regional chains, depends upon direct marketers being able to uniformize their operations: the content of their advertising materials; the assemblage, design, componency and packaging of their products; order-handling, fulfillment and delivery systems; invoicing of their wares; and the terms of their credit arrangements. Such standardizations are essential, also, to realization of economies that can be passed on to consumers, thus benefiting them as well as serving the competitive purposes of DMMA's members.

The decision of the Court of Appeals in this case can be explained only on the basis that the police power of a state is so potent that, given the merest scintilla of a nexus to an event, or to a party involved in an event, it virtually *per se* over-rides all considerations of interstate commerce, substantive due process, and even the sovereignty of other states over transactions that are sited in their own jurisdictions.

If that is indeed the state of constitutional law, fifty different jurisdictions stand free to impose fifty irreconcilably different sets of requirements upon direct marketers as to the kinds of products and services they may or may not vend to citizens of the regulating states, what they may or may not say in promoting the sale of such products or services, the terms of sale and credit that can be used, the times within which deliveries must be made, obligations of service, repair or replacement, and whatever other facets of vendor-vendee relationships might be deemed to affect the welfare of the latter (and what would not?) so as to trigger the states' exercise of their police power.

Even under the, so far, most liberal extension of a potentiating nexus for state control of an out-of-state marketer's activity, *National Geographic Society* v. *California Board of Equalization,* U.S. , 97 S. Ct. 1386

(1977),[1] this Court indicated some disaffection for "slightest presence" as an adequate nexus to support state control; actual activity of the company inside the state was made the basis for such jurisdiction.[2]

Relying upon such a constitutional doctrine, direct marketers, including the within petitioner, have trusted in refraining from maintaining offices, sales or other personnel, or performing other activities within most states, other than to address interstate communications and transportations of products to addressees there located, to insulate themselves from the fragmentation of their business activities that a multitude of heterogeneous state laws could produce.

But now the decision below holds that mere use by a seller of such interstate facilities is enough to establish a police power triggering nexus, if only the addressee is a citizen of the state and physically present in it when he orders the interstate marketed merchandise. It holds, in effect, that, given such citizenship and presence of the buyer, his state can declare illegal and forbid a vendor that maintains no presence within its borders from entering into a credit contract which is in all respects valid within the

[1] While the case involved sales and use taxes, the state's control over the company was not to impose liability upon it as a taxpayer, but to require it to perform services for the state in the role of a tax collector. 97 S. Ct. at 1391.

[2] "Our affirmance of the California Supreme Court is not to be understood as implying agreement with that court's 'slightest presence' standard of constitutional nexus. Appellant's maintenance of two offices in the State and solicitation by employees assigned to those offices of advertising copy in the range of one million dollars annually . . . establish a much more substantial presence than the expression 'slightest presence' connotes. Our affirmance thus rests upon our conclusion that appellant's maintenance of the two offices in California and activities there adequately establishes a relationship or 'nexus' between the Society and the State that renders constitutional the obligations imposed upon appellant . . .". 97 S. Ct. at 1390.

jurisdiction of its consummation; and even though, additionally, the contract is negotiated through interstate channels of communication, and the goods subject to the contract are transported directly to the purchaser in interstate commerce, and the payments, required by the contract are transmitted in interstate commerce.

The obviousness and gravity of that threat to the industry of direct mail advertising and direct marketing plainly explains the interest of DMMA in seeking review by this Court of the decision below.

DMMA urges that the writ be granted and requests that it be given this opportunity to comment as an *amicus curiae* in favor of the petition and, ultimately, on the merits of the case, for it is deeply concerned with the industry-wide effect the Court of Appeals' decision will have if permitted to stand.

Reasons for Granting the Writ

This Court has never held that a state may impose its requirements upon a seller whose only connection with customers in that state is from outside the state by common carrier or the United States mail.

DMMA respectfully submits that a major reason for granting the writ is that the decision below, if allowed to stand following this Court's refusal of a writ in *Aldens, Inc.* v. *Packel,* 425 U.S. 943, may well be anticipated to accelerate a momentum of conformance throughout the circuits, a momentum that will be pernicious if the doctrine the decision supports is an invalid one. Its impacts cannot be other than far-reaching and, if not in truth constitutionally sound, they had best be aborted before their roots pierce deep.

Aldens' petition, at pages 13-25, sets forth adequate reasons why this Court, if it does review the Court of Appeals' determination and opinion, might well be expected to reverse it; certainly Aldens demonstrates minimally that if the result is to be sustained its importance justifies a firmer grounding in constitutional precedent and principle than has yet been put beneath it. We do not need to impose upon this Court's time to repeat what Aldens has written in this regard, but accept and endorse it for DMMA's purposes here.

Respectfully submitted,

GILBERT H. WEIL,
Attorney for Direct Mail/
Marketing Association, Inc.

ROBERT L. SHERMAN
WEIL, GUTTMAN & DAVIS
60 East 42nd Street
New York, New York 10017
(212) 687-8573
Of Counsel